

# Secrets and Lies: A Model Statute for Cooperative Adoption

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# Secrets and Lies: A Model Statute for Cooperative Adoption

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## I. INTRODUCTION

In the last decade, more than 50,000 children have been placed for adoption with unrelated families in the United States, and half of these children were adopted when infants.<sup>1</sup> For the past half-century, the adoption statutes of Great Britain and all American jurisdictions have enveloped the adoption process with secrecy that precludes the adopted child during minority from having an ongoing relationship with the family of origin.<sup>2</sup> Encouraged by counselors, many adopting parents wove a web of deceit, masquerading as the child's birth parents or, if the fact of adoption were admitted, telling lies or feigning lack of information about the birth or the biological parents, despite the child's inevitable questions. All current adoption laws profess a child-centered public policy, typically requiring the court to consider "the best interest of the child."<sup>3</sup> Today the wisdom of the well-intentioned "shielding" policy is challenged by many adoption specialists in the name of the child.

In the words of British psychologist H.J. Sants, children who were adopted early in their lives characteristically experience "genealogical bewilderment."<sup>4</sup> All adopted children are curious about their family of birth; many search for more information about their parents and other biological relatives, even seek reunions, although they have developed strong bonds with their adopting parents. Proponents of "open" or "cooperative" adoptions urge that the degree of openness of the adoption arrangements should be left to the negotiation between the parties to the agreement and their counsellors, following ordinary contract principles, and that such arrangements serve the best interest of the child.<sup>5</sup> Just as forcefully, opponents argue that the continuation of the mandatory secrecy policy is essential to the adopted child's security and adjustment—the child's best interest.<sup>6</sup> In this debate, scant attention has been paid to the difficult problem of the enforceability of such agreements as the needs of the child inevitably change. In modern cases reviewing post-adoption contact agreements, courts similarly make sweeping

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1. Marianne Berry et al., *Preparation, Support, and Satisfaction of Adoptive Families in Agency and Independent Adoptions*, 13 Child & Adolescent Soc. Work J. 157, 157 (1996) [hereinafter Berry (1996)]. For a discussion of the difficulty in securing accurate statistics for American Adoptions, see Kathy S. Stolley, *Statistics on Adoption in the United States*, The Future of Children, Spring 1993, at 26.

2. Indeed, secrecy in adoptions is an international problem. The United Nations Convention on the Rights of the Child, ratified by 140 countries including Great Britain and the United States, endorses "respect for a child's biological heritage and access to that heritage." Mary Martin Mason, *Global Trends in Adoption: What the Future Holds*, Adoptive Families 9 (Mar./Apr. 1996).

3. E.g., Uniform Adoption Act, 9 U.L.A. § 3-703(a) (1994): "The court shall grant a petition for adoption if it determines that the adoption will be in the best interest of the minor" and other requirements are met.

4. *Genealogical Bewilderment in Children with Substitute Parents*, 37 Brit. J. Med. Psychol. 113 (1964).

5. See, e.g., Kenneth W. Watson, *The Case for Open Adoption*, 46 Pub. Welfare 24 (1988).

6. See, e.g., Arienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions III: The Adopted Child*, 2 Child & Adolescent Soc. Work 1399 (1985); see *infra* note 182.

assertions that such agreements violate or serve the "best interest of the child" policy without articulating the vital link between the wall of secrecy and the child's welfare.

For some private adoption agencies, as many as three out of every four adoptions now include some form of openness.<sup>7</sup> As one commentator has observed, "Presently, open adoption is a firestorm on the West Coast, a prairie fire in Texas and the Midwest, and a spotty practice on the East Coast."<sup>8</sup> In the vast majority of states, the legal effect of post-adoption contact agreements is uncertain and unsettled. Only sixteen states now explicitly authorize post-adoption visitation agreements (and waivers of secrecy) in non-relative adoptions, at least in some situations, either by statute<sup>9</sup> or by jurisprudence.<sup>10</sup> Even these approving jurisdictions simply often find that such contracts do not violate public policy and are performable. For example, the Alaska statute states simply that "[n]othing in this chapter prohibits an adoption that allows visitation between the adopted person and that person's natural parents or other relatives."<sup>11</sup> Such an authorization fails to address the critical issue of the enforceability of post-adoption contact agreements, that is, the use of the powers of public courts to order compliance with contractual terms when one party balks.

The traditional adoption statute, with broad language requiring a severance of the legal relationship between birth parent and child, has been interpreted by most courts to disallow private agreements for post-adoption contact. Yet, even in jurisdictions that have clearly rejected cooperative adoptions, reputable, licensed

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7. Mardell Groth et al., *An Agency Moves Toward Open Adoption of Infants*, 66 Child Welfare 247 (1987), reporting on the practices of the Child Service and Family Counseling Center in Atlanta. In her massive study of adopting parents who received children in California adoptive placements from July, 1988 to June, 1989, Berry found that most were open, although in varying degrees. Furthermore, 53% of all adoptive families planned to have some form of contact in the future. See Marianne Berry, *The Practice of Open Adoption: Findings from a Study of 1396 Adoptive Families*, 13 Children & Youth Servs. Rev. 379, 384 (1991) [hereinafter Berry (1991)].

8. Mason, *supra* note 2, at 10.

9. Eleven state statutes broadly authorize visitation agreements between the natural parent and the infant adopted by a non-relative. Alaska Stat. § 25.23.130(c) (Michie 1991); Cal. Fam. Code § 8714.7 (West 1994 & Supp. 1997); Minn. Stat. Ann. § 259.58 (West 1992 & Supp. 1998); Mont. Code Ann. § 42-5-301 (1999); N.M. Stat. Ann. § 32A-5-35 (Michie 1995); Ohio Rev. Code Ann. § 3107.60-3107.65 (West 1996); Or. Rev. Stat. § 109.305(2) (1993); S.D. Codified Laws 25-6-17 (Michie 1998); R.I. Gen. Laws § 15-7-14.4 (1996 & Supp. 1997); Wash. Rev. Code Ann. § 26.33.295(1) (West Supp. 1995); and W. Va. Code § 48.4-12(e) (1996 & Supp. 1997). Three other states authorize open adoptions but in limited situations. Indiana's statute requires that the child be at least two years old at the time of the agreement and have a significant emotional attachment to the natural parent; therefore, it is inapplicable to infant adoptions. Ind. Code Ann. § 19-16(a) (West 1999). The statutes of both Nebraska and New York apply only to children in public foster care who have previously left their birth families through a voluntary or involuntary process. Neb. Rev. Stat. § 43-162 to 165 (1993); N.Y. Soc. Serv. Law § 383-c (McKinney 1992 & Supp. 1995). Maryland further limits its authorization of visitation rights in non-relative adoptions only when the adopting parent is the child's foster parent and the child has been out of the custody of the biological parents for at least three years. Md. Code Ann., Fam. Law § 5-312 (1995).

10. Michaud v. Wawruck, 551 A.2d 738 (Conn. 1988); Adoption of Minor, 291 N.E.2d 729 (Mass. 1973).

11. Alaska Stat. § 25.23.130 (2)(c) (Michie 1991).

adoption agencies continue to offer openness options, reflecting their own professional endorsement of the concept and honoring the requests of their clients.<sup>12</sup> Obviously, the continuance of such practices, despite the courts' disapproval, undermines the law's moral force and creates considerable insecurity for contracting parties and the child.

In the recent public debate of the Uniform Adoption Act, two powerful national groups split on the wisdom of open adoptions. The American Child Welfare League was in favor of such arrangements, whereas the National Council for Adoption was opposed. Faced with this intraprofessional dispute, the drafters deleted provisions that authorized enforcement of court-approved open adoption arrangements.<sup>13</sup> While such silence may well have been a concession essential for promulgation and eventual enactment by states, the drafters did little to quell the current irresolution on such a significant issue for adoption practice.

In this article, we will examine the issue of openness in the context of infant adoptions by non-relatives. By "infant adoption" we mean adoptions of very young children, from birth to around two years of age, whose bonding with their primary caretakers may be disrupted without a strong likelihood of severe, long-lasting damage.<sup>14</sup> Such cases present the clearest clash of competing public policies

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12. Although the Louisiana appellate courts have clearly rejected open adoptions, *Hill v. Moorman*, 525 So. 2d 681 (La. App. 1st Cir. 1988) and *Dugas v. Dugas*, 614 So. 2d 228 (La. App. 3d Cir. 1993), nonetheless, many state licensed agencies continue to draft such contracts. According to one agency director, they operate on the assumption that any agreement is only a moral obligation and will not be enforceable: "Birth mothers know that adoptive parents have the power to cut off contact." Richard T. Caffarel, *Open Adoptions*, presentation at Eliminating the Ghosts of Adoption Conference, New Orleans, La. (Dec. 14, 1995). Before the enactment of an authorizing statute, there was a similar gap between practice and the law in Indiana:

[We] dealt with many such cases, witnessing promises between adopting parents and birth parents with no legal guarantees. Several judges would not sanction or order the agreements for postadoption contact, declaring that they were in no way binding. Other judges defined the agreements as not illegal but "extra-legal." Most judges refused to take note of these promises, and offered no legal recourse if the agreements were violated.

James Kenny et al., *Cooperative Adoption: One Solution to Foster Care Drift*, *Adoptalk* 6 (Winter 1995).

13. The Comments to the initially circulated version of Section 1-105, which describes the legal relationship between the adopted child and his biological parent after adoption, state:

Nothing in the Act precludes an agreement by an adoptive parent to allow an adopted child to visit or communicate with another individual, including an adoptee's former parent, stepparent, relative, or foster parent. Nonetheless, except in the context of an adoption by a stepparent [when visitation agreements are enforceable], the Act is silent on whether or not a post-adoption visitation agreement is enforceable. The Act does explicitly provide that the existence of such an agreement has no effect on the fundamental consequence of an adoption, which is to terminate the parental relationship between the child and the former parents and to create the relationship of parent and child in all respects between the adoptive parents and the adopted child.

14. In fact, any choice of an age-related marker is arbitrary and subject to individual variances. Social science research on infant bonding and attachment suggests that attachments to specific individual caretakers begin at about six months and develop gradually over the first year of life. See Ruth G. McRoy et al., *Openness in Adoption: New Practices, New Issues* 33-35 (1988). There is consensus that the longer and more intimate the relationship between the child and his or her initial

regarding adoption and thus, are the most difficult to resolve.<sup>15</sup> In Part II, we will analyze the historical record for the sources of parental authority to place a child for adoption and the initial justifications for secrecy. In Part III, we will discuss the forces that produced changes in American adoption practice, the shift in the adoption paradigm toward greater contractual flexibility. In Part IV, we will analyze the jurisprudence with a special emphasis on the enforceability of post-adoption contact agreements. In Part V, we will examine the child's "best interest" in light of current social science research regarding the effects of post-adoption contact for all parties to such agreements. We will conclude that cooperative adoption agreements should be authorized, but the practice should be carefully limited to ensure that they are knowingly and voluntarily made. We will present our recommendations for a model statute in the concluding Part VI.

## II. THE SOURCES OF PARENTAL POWER AND ITS LIMITATIONS

The first American statute to authorize adoption was not enacted until 1851,<sup>16</sup> and the first statutes regulating adoption and sealing records appeared much later, well after the turn of the century. However, in colonial times, the absence of adoption statutes did not prevent parents from selecting and privately contracting with surrogate caretakers for their children's benefit. Indeed the roots of adoption, the authority of biological parents to contract with others for the assumption of some or all of the caretaking responsibilities for and associational rights with their children,<sup>17</sup> thread deep into the common law and the parental rights doctrine. The

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caretaker, the greater the likelihood of difficulty for the child if separation becomes necessary. See John Bowlby, *Attachment and Loss* (1969; 1973; 1980); Laura Beck, *Child Development*, especially 388-431 (3d ed. 1994). However, predicting the long-range implications of a permanent separation of a particular child is a very complex task, depending upon the security and exclusivity of the initial relationship, the nature of the replacement relationship, the continuity of similar caretakers and caretaking environments, and the child's own temperament. David M. Brodzinsky, *Long-Term Outcomes in Adoption*, *The Future of Children*, Spring 1993, at 153.

15. In intrafamily adoptions and adoptions of older children who have developed relationships with biological family members, as a practical matter, secrecy may be impossible to maintain and very different dynamics are involved. Other authors have explored those types of adoptions. See Carol Amadio and Stuart Deutsch, *Open Adoption: Allowing Children to "Stay in Touch" With Blood Relatives*, 22 J. Fam. L. 59 (1983-84); Judy Nathan, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. Rev. 633 (1984); Candace Zierdt, *Make New Parents But Keep the Old*, 69 N.D. L. Rev. 497 (1993); and Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. Rev. 997 (1995) [hereinafter Appell (1995)] and *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 Fam. L.Q. 483 (1996).

16. As Presser points out, whether Mississippi or Massachusetts was the first state to enact an adoption statute depends on what is meant by "adoption statute." In 1846, Mississippi enacted a law requiring the public recordation of private and otherwise unsupervised adoption agreements. Five years later, Massachusetts enacted the first modern adoption statute by providing a process for judicial confirmation that any proposed adoption was in the child's best interest. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443 nn. 111 and 112, 466 (1971).

17. The parent-child relationship produces both property and personal rights and responsibilities.

parental rights doctrine creates the possibility that children can be relinquished permanently by their birth parents to other would-be parents. Before an adoption can be decreed, the court must find that the biological parents' rights have been voluntarily surrendered or that cause exists to terminate such rights involuntarily.<sup>18</sup>

Less well documented is the twentieth century regulation of adoption, especially the sources of the policy of secrecy in adoptions.<sup>19</sup> The eventual sealing of adoption records made the exercise of any continued contact between the biological parents and their child exceedingly difficult, if not impossible. Was the impermeable wall between the child's birth family and adopting family erected to protect the adopting family, the birth family, or the child, or to accomplish some other social good? Modern courts tend to assume that mandatory secrecy provisions are so deeply entrenched in the law that the entire structure of adoption would be jeopardized if they were removed. Consequently, discerning the pedigree of forced confidentiality policies might motivate their re-examination.

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For an analysis of the bundle of "parenting" rights or personal rights, see James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. Tol. L. Rev. 805 (1995).

18. In this article, we are exclusively concerned with the consensual adoption. However, the involuntary severance of parental rights by court decree is another means of freeing children for adoption. The termination of parental rights statutes of all jurisdictions require a demonstration of some substantial parental dereliction, such as abandonment or extreme cruelty, or profound parental incapacity. See, e.g., La. Ch.C. Tit. X. Parental rights are protected by the constitution when the state attempts to disrupt the relationship between a biological parent and his child, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972), or when state law fails to honor the parental rights doctrine. As the Supreme Court reiterated in *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, an adoption case decided in 1978:

We have little doubt that the Due Process Clause would be offended, "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of [parental] unfitness and for the sole reason that to do so was thought to be in the children's best interest," *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, 97 S. Ct. 2094, 2119 (1977).

This result was anticipated in an early adoption case, *Schiltz v. Roenitz*, 86 Wis. 31 (1893), in which the Wisconsin Supreme Court stated that the adoption order deprived the father of "his most sacred natural rights in respect to his child." *Id.* at 40.

19. Several excellent articles trace the development of adoption from ancient times forward to the early development of the American law of adoption. See Presser, *supra* note 16; Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743 (1956); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Court, 1796-1851*, 73 Nw. L. Rev. 1038 (1979); and Emelyn Foster Peck, *Adoption Laws in the United States: A Summary of the Development of Adoption Legislation and Significant Features of Adoption Statutes, with the Text of Selected Laws*, Children's Bureau Publication No. 148 (1925). Others detail the modern adoption process. See, e.g., *Adoption Law and Practice* (J.H. Hollinger, ed.) (1988) [hereinafter Hollinger]; Ruth Arlene Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 27 Fam. L. Q. 173 (1983); and John M. Stoxen, *The Best of Both "Open" and "Closed" Adoption Worlds: A Call for Reform of State Statutes*, 13 J. of Legis. 292 (1986). However, heretofore we are unaware of any published summary of developments in the critical period, 1925-1940, when the shape of the adoption secrecy policy emerged. For the textual discussion, *infra* text accompanying notes 92-105, we have relied on original historical research.

### A. *The Evolution of the Parental Rights Doctrine*

There is nothing in the legislative history of the early adoption statutes that would indicate that adoption was conceived of as anything more than an extension of the existing parental rights doctrine to authorize permanent transfers of parental authority and inheritance rights. Rights of parental association were and are conceptually distinct from matters of possession or decision-making authority as illustrated by the apprenticeship doctrine. Similarly, there was nothing in early twentieth century general contract law that would preclude the enforcement of two separate independent contracts between parties to a bargain. Yet this reconceptualization of adoption as a status that even willing parties could not alter became imbedded rather quickly in American law.

From ancient times forward, biological parents have been deemed to have possessory and proprietary "rights" in their offspring.<sup>20</sup> The parental rights doctrine recognized the father's natural or inherent and paramount authority to exercise the personal rights of association and nurturance of his child and to make decisions affecting the child's well-being or, *a fortiori*, to choose a surrogate who could exercise delegated parental authority during the child's minority. This parental authority was recognized by statute in England in 1660.<sup>21</sup> The father (and eventually the mother as well) could appoint a tutor to undertake parental duties of education, appoint a guardian of his child's property, or, by deed or will, dispose of the custody of his child, "either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one and twenty years."<sup>22</sup> In both England and the United States, this doctrine is the source of the authority of a biological parent to create temporary arrangements and as was ultimately recognized, to achieve the permanent transfer of a child for adoption. It is also the source of American constitutional protection for parental decisionmaking.<sup>23</sup>

According to Blackstone, the parental rights doctrine rested on the assumption that human reproduction carries emotional as well as genetic bonds that will motivate a parent to secure his child's continuing welfare: "[Though laws provide for enforcement of parental duties] providence has done it more effectually than any laws, by implanting in the breast of every parent that natural *storge*, or

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20. Several scholars have criticized the ancient and persistent treatment of children as mere chattel, as proper subjects for contracts. See Barbara Woodhouse, *Who Owns the Child?* Meyer and Pierce, and *the Child as Property*, 33 Wm. & Mary L. Rev. 995 (1992). See also Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987) for a broader criticism of the commodification of children. Conversely, others have proposed that adoption law and practice, though subject to some regulation, should acknowledge and more nearly reflect market forces. See, e.g., Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59 (1987).

21. 12 Car. II, c. 24, § VIII [1660].

22. 1 William Blackstone, *Commentaries on the Laws of England* 450 [1765] (1st ed. reprint 1966).

23. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438 (1944).



insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish."<sup>24</sup>

The most common variant of the parent's contractual power was indenture or voluntary apprenticeship of the child. The contract transferred the parent's rights, including his right to the child's wages and his duty of support, to the new master.<sup>25</sup> Until the mid-nineteenth century in England, the father possessed an almost unlimited right to choose a surrogate and even to revoke at will a contract of custody, although the child had established some bonds with the caretaker.<sup>26</sup> However, even then, there were signs of doctrinal change. As early as 1756, the British Court of Chancery was claiming the royal prerogative as "*parens patriae*"<sup>27</sup>

24. 1 Blackstone, *supra* note 22, at 435.

25. Though these were voluntary arrangements in the sense of an ordinary contract between the adults, they were not voluntary insofar as the child was concerned. Apparently the child's consent or confirmation was not required during minority. Lucy S. Forrester and Charles F. Hicks, *Dependent Children and Social Welfare Legislation*, 15 J. Pub. L. 349 (1966). Involuntary apprenticeship was a parallel concept used for the custody transfers of orphans, abandoned or destitute children, and bastards who were legally considered to be "*filius nullius*"—the "child of no one"—the private responsibility of no father. 1 Blackstone, *supra* note 22, at 447. This mechanism has been characterized as "involuntary" apprenticeship because the consent of the biological parent was not required. The local or parish government assumed the parent's authority to negotiate a contract with a master whereby the child's services were exchanged for the master's promise to support and sometimes to educate the child. See generally, Michael Grossberg, *Governing The Hearth: Law & Family In Nineteenth Century America* 260-66 (1985); Presser, *supra* note 16, at 453-60, 472-73. In Colonial America until the late 1800s, involuntary apprenticeship was commonly used because early America had few institutions or asylums. See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 Stan. L. Rev. 257 (1964).

26. *Regina v. Smith*, 22 Law J. Q.B. 116-17 (1853). This case involved a clear agreement between a father and his brother-in-law transferring the care of a six-year-old daughter. The father agreed that he would not interfere with the child's uncle or seek to remove her from his care until the child was able to provide for herself. After only a year, the father sought to revoke his agreement and by writ of habeas corpus sought her return. The law court approved the writ, finding that the father was at liberty to revoke his consent. Though this case has been cited by American scholars for the proposition that in England, parental authority was absolute and custody agreements were revocable, James Schouler, *A Treatise On the Law of Divorce, Separation and Domestic Relations* § 748, 802 (6th ed. by A.W. Blakemore 1921), there was no issue that the father in *Smith* was unfit to retake the child's custody. Furthermore, the assertion of the general principle ignores the contrary decisions of the Court of Chancery.

27. *Parens patriae*—literally "the King as father of the country"—was first viewed as a duty owed by the crown to its subject. Chitty defined this duty as follows:

The King is in legal contemplation the guardian of his people; and in that amiable capacity is entitled (or rather it is his Majesty's duty, in return for the allegiance paid him,) to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property.

J. Chitty, *A Treatise On the Law or the Prerogatives of the Crown* 155 (1820). For a comprehensive discussion of the effect of delegating this duty as *parens patriae* to Chancery, see Neil H. Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae"*, 22 S.C. L.Q. 147 (1970). For a fascinating discussion of the historical beginnings of Chancery's assumption of its power in custody cases, see Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L.J. 195 (1978).

in guardianships "to interfere in particular cases, for the benefit of such who are incapable to protect themselves."<sup>28</sup> Thus, while the parent's right to transfer his child's custody by contract was confirmed, his right to dishonor his agreement was restricted. By 1820, the Chancery Court was clearly exercising its power to review custody agreements and to enforce them if the parent's attempted revocation disserved the child's interests.<sup>29</sup>

In the United States by the time of the late nineteenth century, a conflict of opinion had developed regarding the strength of the parental rights doctrine, mirroring the split between law and chancery courts in England. Some states held that custody agreements entered into by parents were invalid and thus, the parent could freely revoke them and demand the return of the child.<sup>30</sup> Other states would enforce the agreement, but only after a judicial inquiry concerning the needs and interests of the child.<sup>31</sup> In his treatise published in 1930, Professor Peck suggested that "more and more, in determining controversies over the possession of a child, the courts have subordinated the legal rights of the father to the equities existing in the case, and still more to the real interest of the child itself."<sup>32</sup> As one court explained in an 1908 decision, these voluntary parental agreements conveying the child's custody to a surrogate were sanctioned because:

The law presumes . . . that a parent, in disposing of his child, would be actuated by motives that are proper, and that his chief concern would be the welfare of the child. . . . [When state law] provided that the father could release his parental power over his child to another, it presumed that the parent would, in making such contract, always have in mind the interests of his child.<sup>33</sup>

This early expression of the American parental rights principle, echoing Blackstone, includes both an acknowledgement of parental power and its limitation. The doctrine of parental rights creates only a rebuttable presumption of the enforceability of any transfer of the child's custody, thus permitting a showing in the particular case whether the child's needs would be better served by enforcement or abrogation of the contract. When reviewing child custody disputes, American

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28. For further discussion of the development of *parens patriae* in British and early American custody disputes, see Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 Emory L.J. 209 (1978).

29. *Lyons v. Blenkin*, 37 Eng. Rep. 842 (Ch. 1820). In this case the father sought to regain his children's custody from their maternal aunt. The court held that having permitted the aunt to support and care for the children since infancy, the father could not now seek to undo the children's expectations of her continued care and maintenance. The court awarded custody to the aunt because this placement would be in the children's best interest.

30. See, e.g., *Mayne v. Bredwin*, 1 Halsted, Ch. R. 454 (N.J. 1846); see generally Schouler, *supra* note 26, at §§ 748, 802-805, who states that this is the "general American rule."

31. *Pool v. Gott*, 14 Monthly L. Rep. 269 (Mass. 1851).

32. Epaphroditus Peck, *The Law of Persons and of Domestic Relations*, § 130, 371-373 (3d ed. 1930).

33. *Eaves v. Fears*, 64 S.E. 269 (Ga. 1908).

courts embraced the judicial authority of *parens patriae*, troubled little by the absence of any monarchical delegation.<sup>34</sup>

Aside from formal apprenticeships,<sup>35</sup> throughout the nineteenth century, parents who were cramped with too many children and too little income arranged private placements usually with friends or relatives. Obviously, the apprenticeships and other custody agreements arranged between biological parents and substitute caretakers were face-to-face transactions. However, these usually informal placements were enforceable as transfers of custody but accorded the child no legal rights as an heir of the surrogates.<sup>36</sup> Nevertheless, unlike the apprenticeship agreements, the surrogate parents often sought to create permanent family bonds and sometimes even promised to provide for the child in their wills. In exchange, the surrogate family received the right to the child's services and custody.<sup>37</sup> Some wealthier surrogates were able to obtain private legislative acts authorizing their adoption of a child, but even then, most courts refused to find that the child was the heir of the adopting parents.<sup>38</sup> A new legal mechanism was required that would confirm the biological parent's authority to relinquish claims of heirship to the child as well as claims to the child's possession and control.

In 1851, Massachusetts enacted the first Anglo-American adoption statute, reviving the ancient authorization of Roman law.<sup>39</sup> During the Roman Empire, a man formally adopted another's child for two main reasons: to prevent extinction of the family and to perpetuate the family rituals of ancestor worship.<sup>40</sup> The adoptee became subjected to the *patria potestas* of his new father; this power gave

34. See, e.g., in re Mitchell, 1 Ga. Rep. Ann. (R.M. Charlton, 489) 291, 293 (1836): "All legal rights, even those of personal security and liberty may be forfeited by improper conduct, and so this legal right of the father to the possession of his child, must be subservient to the true interests of safety of the child, and to the duty of the State to protect its citizens of whatever age."

35. Although the indenture of children was not a part of the common law as accepted in America, apprenticeships, both voluntary and involuntary, had been authorized in this country by state statutes since colonial times. Clark v. Goddard, 84 Am. Dec. 777 (Ala. 1863).

36. The statutory order of succession is established by legislation in all states and can only be altered by the decedent's execution of a valid will or testament. The enforceability of a contract to make a child an intestate heir or even to provide for the child by testament is governed by general principles of contract law although in most states greater formalities are required and the remedy of the disappointed beneficiary may be more limited. See § 2-701, Uniform Probate Code, 8 U.L.A. 66 (1982); see generally Paul G. Haskell, Preface To Wills, Trusts & Administration 55-61 (2d ed. 1994).

37. Hollinger, *supra* note 19, §§ 1-21 to 1-22.

38. See, e.g., Ferguson v. Jones, 20 P. 842 (Or. 1888); Long v. Hewitt, 44 Iowa 363 (1876); Shafer v. Eneu, 54 Pa. 304 (1867). These cases illustrate that even after the enactment of adoption statutes, courts continued to construe them strictly and to deny inheritance rights for the adopted child unless the statute explicitly provided for such rights.

39. Unlike the Roman law, the common law of England never recognized formal adoption, and not until 1926 with the enactment of a statute did England recognize formal adoption that accorded inheritance rights. "Adoption of Children Act," 1926, 16 & 17 Geo. 5, ch. 29. Although British law developed the parental rights doctrine, somewhat ironically, the penultimate extension of that doctrine—a permanent transfer of authority and responsibility for adoption—had never before been recognized. Artificial parenthood via adoption was an anathema to the British property concepts of ownership through ancestry and inheritance based on consanguinity. Zainaldin, *supra* note 19, at 1044-46.

40. Presser, *supra* note 16; Huard, *supra* note 19.

the adopting father absolute control over his children, "including even the power of life and death."<sup>41</sup> The child's interest was not a public concern, although the child might well benefit indirectly from the adoption. The Roman adoption laws generally allowed the child to inherit from his or her adopted father and severed the child's ties with his biological family, thereby creating a new artificial family that would last for the child's life. Although the concept of the substitution of families originated at Roman law, the notion that a complete severance of social ties with the biological family was inherent in or essential to the effectuation of the substitution of legal rights and authority was remarkably absent. Ancient adoptions were completely disclosed, publicly acknowledged and culturally endorsed transactions.<sup>42</sup> The great Emperor Augustus was the adopted child of his biological uncle, Julius Caesar, who with his wife, Calpurnia, was unable to produce biological offspring.

The Massachusetts statute of 1851 prescribed the ordinary civil suit model for adoption proceedings.<sup>43</sup> The Massachusetts adoption model, which required judicial supervision and approval of the adoption, quickly spread to other jurisdictions.<sup>44</sup> The pleadings fully disclosed the identities of the biological parents<sup>45</sup> and adopting parents, and all parties appeared in court. The hearing was open to the public, and newspapers commonly reported details concerning the adoptions.<sup>46</sup> Within a hundred years, the model had changed. The biological parents had become phantomized: Written consents to the adoption were ordinarily taken before any petition was filed, and they no longer appeared at the hearing.

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41. Presser, *supra* note 16, at 447.

42. There are modern examples as well. In 1947, nearly one-third of the children on the island of Mokil in the eastern Caroline Islands were found to have been adopted and living out of the homes of their biological parents. In addition, "When the culture of the Polynesian Marquesas Islands was first studied adoption had been developed to the point where practically all children were adopted. A couple would ask for an infant before it had been born, and social pressure was so strong that the natural parents would find it almost impossible to refuse the request. . . . In societies such as these it is easy to be an adoptive parent or an adopted child for the adoptive family becomes as normal a unit as the biological family." Rael Jean Isaac, *Adopting a Child Today* 165 (1965).

43. 1851 Mass. Acts ch. 324. Massachusetts enacted the prototype of the generally applicable, modern adoption statute. Earlier, several states, for example, Mississippi, Louisiana, and Texas, enacted statutes that simply provided a procedural mechanism for authenticating and recording private adoption agreements. See Presser, *supra* note 16, at 465-67, and Hollinger, *supra* note 19, at §§ 1-22 to 1-24, for discussion of the different statutes. General adoption laws were a logical step after previous decades of private legislative acts to formalize adoption. Costly and inefficient, these private acts affected few children. Presser, *supra* note 16, at 463-64; Zainaldin, *supra* note 19, at 1042-43.

44. See Presser, *supra* note 16, at 466 n.112.

45. Using the plural "biological parents" is slightly misleading. Until the 1960s, only the mother of an illegitimate child was thought to possess parental rights in her child's custody and thus, only her consent was required for her child's adoption. In *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972), the Supreme Court recognized that in issues of child custody, putative fathers of illegitimate children must be accorded due process of law. Still today, in adoption cases, the putative father's rights are not congruent with the mother's rights. Only if the putative father has seized his "opportunity interest" by demonstrating the assumption of parental responsibility toward the child is he empowered to block an adoption by withholding his consent. *Lehr v. Robertson*, 463 U.S. 248, 262, 103 S. Ct. 2985, 2993-94 (1983).

46. Hollinger, *supra* note 19, at §§ 1-37-1-38.

They were not identified in the adoption petition. The parties to the adoption could be linked only by coupling the document of consent with the adoption petition, a connection only the court or the placement agency could make.<sup>47</sup> A completely new birth certificate was issued which replaced the personal data of the biological parents with the personal data of the adopting parents.

What had happened in the intervening century to cause this about-face? There is no single watershed event, but instead a combination of social forces that coalesced to produce a change in the adoption paradigm.

### *B. Early Adoption Statutes and the Shift from Contract to Status*

Reflecting the *parens patriae* limitation upon the parental rights doctrine, the early adoption statutes explicitly expressed a concern for the child's welfare separate from the adults' proprietary interests in the child.<sup>48</sup> Like custody claims arising out of contract, consensual adoptions required a two-step analysis: an initial finding that the adoption agreement existed<sup>49</sup> and then and only then, judicial review to ensure that the adoption served the child's best interest. Thus, the Massachusetts statute required the biological parents' written consent to the adoption, and also the consent of the child if over thirteen years of age. For young children, the judge was authorized to speak on their behalf. Next, the Massachusetts statute required that the adopter and spouse join in the adoption petition and required court approval of their suitability as parents: that they possessed "sufficient ability to bring up the child, and furnish suitable nurture and education . . . and that it is fit and proper that such adoption should take effect."<sup>50</sup> Finally, the statute also resolved the question of heirship and the legal status of all the parties in the adoption: the adopted child would become "to all intents and purposes" the legal child of the adopters, and the natural parents would be divested of all legal rights and obligations with regard to the adopted child.<sup>51</sup>

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47. As early as 1949, the Children's Bureau recommended the separation of documentary evidence concerning the biological parents and the adopting parents. See *Essentials of Adoption Law and Procedure* (Children's Bureau Publication No. 331-1949) 13 (1949).

48. Many scholars have interpreted family law towards the end of the nineteenth century as generally progressive and child-centered. See Presser, *supra* note 16, at 492, and Grossberg, *supra* note 25, at 273-78. Although they acknowledge the judiciary's narrow construction of the adoption statutes in inheritance disputes and courts' hostility towards the adopted child's right as an heir, they emphasize that the language of early adoption statutes expressed a public policy of insuring protection for the child's own needs. However, early cases suggest that although courts dutifully proclaimed the centrality of the child's welfare, their analysis more often than not ignored any concern for whether the child's interests would be promoted by recognition of an alleged adoption contract. See, e.g., *Vandermiss v. Gilbert* (Pa. 1899) (procedural irregularity in the adoption proceeding justified the removal of a seven-year-old from the custody of a close family friend), and authorities cited *supra* note 25.

49. The parent could sue a third party for enticement if he or she induced the child to leave the parent's home or harbored the child after he had left the parent. The parent's damages were for the value of the loss of the child's service and society. See Schouler, *supra* note 26, § 750, at 807-11.

50. 1851 Mass. Acts ch. 324, § 5.

51. *Id.*

Although none of the early statutes, including the Massachusetts model, mandated secrecy or sealed adoption records,<sup>52</sup> a misconception of the concept of parental substitution laid the groundwork. Although commonly overlooked by commentators, the earliest post-adoption contact dispute, *Stickles v. Reichardt*,<sup>53</sup> was decided by the Supreme Court of Wisconsin in 1931. The father of a child whose mother had died when he was eight months old had been forced to place him in the home of relatives although the father had been a faithful parent, providing both support and consistent visitation. When the child was three, the father's employer and longtime friend proposed that he and his wife adopt him because they could provide greater material advantages. Both of the adopting parents represented to the father that they would respect his parenthood and permit continued visitation after the adoption. The father agreed, and the adoption was finalized. Four months thereafter the adopting parents notified the father to stay away from their home and repudiated the agreement. Although the Wisconsin Supreme Court noted the "strong emotional appeal" of the facts,<sup>54</sup> it sustained the demurrer that the father had no cause of action to compel performance of the agreement for visitation.

In material part, the Wisconsin adoption statute described the effect of an adoption decree:

A child so adopted shall be deemed, for the purposes of inheritance and succession and for all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption, excepting that such child shall not be capable of taking property expressly limited to the heirs of the body of such parents. . . .

The natural parents of such child shall be deprived, by such order of adoption, of such legal rights, if any, of whatsoever nature which they may have respecting such child and its property.<sup>55</sup>

There is no indication on the face of the statute that the parties were precluded from altering their post-adoption status by contract. Even if the statute were interpreted as disabling the biological parents' from the assertion of any continuing parental rights, certainly the statute did not disable the new, fully empowered adopting parents from ceding some of their parental rights to anyone, including the

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52. Little documentation exists to explain why the Massachusetts Legislature passed such a progressive, child-centered law. In his in-depth study of Massachusetts legislative documents, Zainaldin found "[n]either public discussion nor debate surrounded the passage of the act." Zainaldin, *supra* note 19, at 1043 n.11. According to an 1874 commentary, "[The Massachusetts statute] was, as we are informed, originally passed as a remedy for the distressing cases arising under the custom of adopting children, which was then increasing rapidly in that state, through the efforts of founding societies." *The Law of Adoption*, 9 Am. L. Rev. 74, 80 (1874), quoted in Zainaldin, *supra* note 19, at 1044 n.13. For discussion of these organizations, see the *infra* text accompanying notes 64-68.

53. 234 N.W. 728 (Wis. 1931).

54. *Id.* at 730.

55. The Children's Code of Wisconsin, 1929 Wisc. Laws ch. 439, § 322.07.

biological parent. As the new, legal parents, according to the parental rights doctrine, the adoptive parents would be bound by their contract. Judicial review of any contract was limited to ensuring that the child's interests were served by enforcement. The court interpreted Wisconsin's effect of adoption statutory provision to withdraw the power of *both* parties to agree to any arrangement permitting a continuing relationship between the biological parent and his child.

Properly construed, "effects of adoption" provisions should be viewed as neutral expressions of public policy, neither approving nor forbidding the enforcement of privately negotiated contact agreements.<sup>56</sup> Although there is no recorded legislative history for this particular statute nor for the comprehensive Children's Code of Wisconsin of 1929, of which it was a part, the court further simply assumed that the child's interests would be disserved by enforcing the visitation contract. There was no factfinding about the impact of continued contact with his father upon the son nor did the appellate court find the record deficient. As the court observed:

In determining matters having to do with the custody of children, the primary question is, What is for the best interest of the child? Where a parent has voluntarily contracted away his rights, and the child as a result has formed new attachments, it may very well be that a situation has been created which a court will hesitate to disturb, not on the principal ground that the contract was valid or invalid, but because, everything considered, the welfare of the child demands the continuance of the new relationship. In many cases language is used which indicates that the court's conclusion is based upon the contractual rights of the parties as such, but in reality that is only one factor in a number of factors which leads the court to the conclusion that the best interest of the child require[s] its custody to be left where the contract [of adoption] placed it.<sup>57</sup>

The *Stickles* decision was strongly criticized in a contemporary law review commentary, which urged that contractual rights of continued contact should be enforced unless it is demonstrated that the child would suffer from enforcement.<sup>58</sup> The commentary cited two instances of public policy that supported enforcement: the court's parallel authority to permit visitation in divorce cases unless the child was harmed by a continued relationship with the noncustodial parent, and the encouragement of adoptions. As the anonymous author elaborated:

The usual consent to adoption is given because the natural parents feel that they cannot provide for their child as adequately as the prospective

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56. This construction was ultimately endorsed by a New Mexico Court of Appeals in *In re Adoption of Francisco A.*, 866 P.2d 1175 (N.M. Ct. App. 1993).

57. *Stickles*, 234 N.W. at 730.

58. Note, 16 Iowa L. Rev. 538 (1930-31). The *Stickles* decision was also the subject of a brief recent cases report in Note, 15 Minn. L. Rev. 719 (1930-31), which concluded that the decision reached "a desirable result . . . although the decision was undoubtedly harsh on the natural parent. . . ." *Id.* at 720.

adoptive parents, not because the natural ties of affection are weak and they wish to part with the child forever. Thus they will condition their assent to the adoption on a provision that they be allowed to visit the child after the adoption and if they know that such a condition will be unenforceable after the child is adopted they may refuse to consent at all. The child's advantages in life are thus lessened and he faces the world under handicaps which might have been removed—his welfare has been sacrificed to a technical interpretation of the statutory status of adoptive parents. The prospective foster parents are deprived of the companionship and affection of the child and the natural parents sustain a burden which is of no special benefit to anyone. Hence, adoptions which might take place to the advantage of everyone concerned—the child, the foster parents, and the natural parents—are thwarted.<sup>59</sup>

By 1936, when Professor Chester Vernier published his treatise on American family law, he noted that the typical statute used language borrowed from the Massachusetts model that the adopted child is to be considered "to all legal intents and purposes" or "in all respects" as the legitimate child of the adopting parents.<sup>60</sup> As he reasoned:

It seems probable, however, that such provisions will be construed broadly as being intended to create the artificial parental relationship with all of the incidents naturally arising therefrom. If the legislative intent is found to be to permit a substitution of parents in legal effect, it would seem clear that the legal rights of the natural parent are cut off by the adoption.<sup>61</sup>

### C. *The Social Context of Early Adoption*

Around the same time as the enactment of the first Massachusetts adoption statute, the practices of American charitable agencies underwent a shift from an institutional model, taking in infants and schooling them until mature enough (at about age seven) to work in apprenticeships or indenture, to placing younger children in foster families.<sup>62</sup> Despite the enactment of adoption statutes, at the turn

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59. Note, 16 Iowa L. Rev., *supra* note 58, at 540.

60. 4 American Family Laws § 261, 406 (1936).

61. *Id.*

62. The early practice of the institutionalized incubation of children may have been due in part to the eugenics movement. Because any "feeble-minded" trait would not manifest itself immediately in the infant, both the institutions and prospective wealthy parents, fearful of adopting a defective child, thought it prudent to arrange adoptions of only older children. For potential adopting parents of moderate means, very young children represented an immediate economic loss. In an era in which children were valued for their contribution to the family enterprise, Hollinger, *supra* note 19, at § 1-44, older children whose stamina and character could be more accurately appraised were preferred as less risky additional family members.

The reasons prompting the shift toward early adoptive placement are complex. Presser hypothesizes that the apprenticeship model had fallen into abuse at the hands of overreaching masters looking for



of the century, most "adoptive" placements still occurred beyond the pale of the law. When birth families were unable to arrange for temporary custody or adoptions with other relatives or friends, their only recourse was to surrender the child to public almshouses, "Infant's Hospitals" or foundling asylums operated by religious or other private charitable organizations.<sup>63</sup>

In 1853, the New York Children's Aid Society of New York was organized and slightly later in 1865, the Children's Aid Society of Boston followed. A major mission of both of these powerful early child protection enterprises was the placing of young children with families.<sup>64</sup> While infant adoption served a public purpose of conserving precious charitable resources at a time of massive immigration and urban poverty, the primary purpose voiced by their officers was to salvage a future for children whose biological families could not provide for them.<sup>65</sup> Initially these organizations operated outside the general statutory framework for adoption, without court supervision or executive regulation.

The charters of these charitable societies permitted their officers to receive destitute children from their parents and to execute agreements of adoption on their behalf with persons willing to "assume the obligations of parents."<sup>66</sup> Rarely did the

cheap labor; that the rise of public education made private institutional instruction unnecessary; and that immigration threatened to swamp the abilities of private charitable organizations to provide lengthy care for children. Presser, *supra* note 16, at 474-81.

63. Presser documents the tremendous growth of these institutions between 1800 and 1860. See Presser, *supra* note 16, at 472-74.

64. *Id.* at 474.

65. With messianic zeal, an 1850 report of a Boston charitable organization extolled the benefits of adoption:

[Y]ou should see the neglected and exposed, for whom vice and infamy seemed waiting as for their certain prey, when some messenger of mercy has led them away, and brought them here in safety from the contagion and ruin. And, following these children farther into life, you should see some adopted into families, where they are loved and cherished as if natural members of the household; . . . finding in those among who they were placed friends, who care kindly for them, and toward whom their affections are called warmly forth, although there is none to claim kindred of blood with them. You should see a happy wife, the mother of a promising family . . . and to hear such a one say, "What would have become of me, had it not been for the asylum, and the family in which its managers placed me?"

Annual Report of the Boston Female Asylum 32 (1850).

Not everyone so enthusiastically endorsed adoption nor the ascendancy of nurture over nature on which it was based. A member of the bar of Massachusetts, William H. Whitmore, eventually published a treatise challenging the social utility of adoption. With misgivings approaching the vitriolic, he opined:

In this country, in most of the states, when the relationship of an adopted child has been established, it is irrevocable. . . . Considering the fact that the subjects of adoption are so largely taken from the waifs of society, foundlings or children whose parents are depraved and worthless; considering also the growing belief that many traits of mind are hereditary and almost irradicable [*sic*]; it may be questioned whether the great laxity of the American rule is for the public benefit.

Whitmore, *The Law of Adoption* 73-74 (1876). For this juxtaposition of the contrasting philosophies of nineteenth century professionals, we are indebted to Presser, *supra* note 16.

66. *Matter of Thorne*, 49 N.E. 661 (N.Y. Ct. App. 1898). Some organizations operated under legislative charters and received children by court commitments. In return for public funding, they were subject to at least some state supervision. Hollinger, *supra* note 19, at § 1.03[2] n.23. Other

agencies enter into formal releases for adoption when a child was placed.<sup>67</sup> There was no judicial oversight of these arrangements; indeed, many adopting parents failed to seek a private legislative act of adoption,<sup>68</sup> leaving the children in a legal limbo.

However, in addition to the placing-out activities of chartered philanthropic agencies, around the turn of the century, there emerged a thriving private market for arranging adoptions. A California report issued in 1910 noted: "Under the designation of maternity homes, lying-in hospitals, baby homes or baby farms, there is in existence a class of institutions that traffic in the illegitimate children."<sup>69</sup> These entrepreneurs attracted pregnant, unwed girls to their facilities with the promise of secrecy thereby concealing the illegitimate birth and sparing the girl's reputation. For a small fee the girl delivered the baby in the facility, left the child with the baby "farmer," and returned to society with the explanation that she "had been taking the rest cure."<sup>70</sup> The facility would then sell the infant to an adopting parent. Even if there were papers of transfer, such as a surrender from the birth mother to the agency and in turn, from the agency to the adopting parents, there was no requirement that the papers be filed in court. Operating without any public oversight, similar operations flourished in many states.<sup>71</sup>

Yet taking a "rest cure" trivializes the experience of many impoverished pregnant women. A description of certain Texas maternity homes' practices paints a more damning picture of the pressures that might cause an unwed mother to resort

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organizations, like the Children's Aid Society of New York, received children only through voluntary placements from biological parents and were subject to no state supervision. See also Arthur D. Sorosky et al., *The Adoption Triangle* 30-31 (1978).

67. Reverend Charles Loring Brace, the founder of the New York Children's Aid Society, has become infamous for his development of the Society's "Emigration Plan" the purpose of which was to "connect the supply of juvenile labor of the city with the demand from the country, and to place unfortunate, destitute, vagrant and abandoned children at once in good families in the country." Charles L. Brace, *The Best Method Of Disposing of Pauper and Vagrant Children* 12 (1859). Thus, Brace seemed to perform the same function in the late 1800s as the poor law officials did before him: to meet the demand for cheap labor needed in the nation's westward expansion from the supply of orphaned and destitute children. Under his leadership, the Society was responsible for rounding up and relocating up to 100,000 northeastern urban street "orphans" to western states although many of these children had living parents. Hollinger, *supra* note 19, at §§ 1-27 and 1-32. See also Diana Dewar, *Orphans of the Living* (1968). For a more complex portrait of Rev. Brace, see Presser, *supra* note 16, at 480-87. Regulation of agency adoption practices did not occur until the 1920s.

68. Hollinger, *supra* note 19, at § 1-32. Moreover, this phenomenon prevailed for over a half-century. Only 30% of the nearly 1,000 children placed out by one New York charitable organization from 1898-1922 were ever legally adopted. S. Thies, *How Foster Children Turn Out* (1924), cited in Hollinger, *supra* note 19, at § 1-46.

69. State Board of Charities and Corrections, 1908-1910 Biennial Report, quoted by Jacobus tenBroek, *California's Adoption Law and Programs*, 6 *Hastings L. J.* 261, 301 (1955). As defined by a 1917 Tennessee statute, a "Maternity home" is "[a] house or other place maintained or conducted for the care and treatment of women during pregnancy and subsequent to the birth of children, and usually advertised for such work and the disposition of unwanted children." 1917 Tenn. Public Acts ch. 120, § 4 (Thompson's Shannon's Code 1918, §§ 4436a-65a9).

70. TenBroek, *supra* note 69, at 300-01.

71. Hollinger, *supra* note 19, at 1-33.

to a babydealer.<sup>72</sup> Some operators used confidentiality as an inducement for the birth mother to relinquish the child to the facility, shielded from the stigma of unwed motherhood; however, the shield could also become a sword as some baby farmers used the knowledge of the illegitimate birth to blackmail any birth mother who changed her mind about leaving the child with them.<sup>73</sup> Although confidentiality may have incidentally protected the birth mother and child, it was a powerful inducement for many adopting parents. The seller promised the adopting parent complete secrecy and confidentiality to increase the demand for his product. Potential adopters would have found confidentiality particularly attractive because of the great shame and discrimination then resulting from illegitimate birth.<sup>74</sup> From all the available information, these baby farms apparently arranged the first inter-party confidential adoption. In effect, the sellers used secrecy as a kind of product differentiation to induce adopters to buy their babies.<sup>75</sup>

The exertion of state power over the privateers—the operators of maternity homes, baby homes, and baby farms—was essential to the protection of all parties

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72. According to an early Texas Report:

It is said to be the practice of many maternity homes to refuse admission to any unmarried pregnant woman who will not first sign her consent to the adoption of her unborn baby. Hungry, jobless, afraid to face her family, with parturition rapidly approaching, often distant by miles from free hospitals, perhaps previously denied hospitalization because their maternity wards were crowded, the young mother, ignorant of the existence of social agencies which might safeguard her maternity, or, more often, living in a community absolutely lacking any such salutary facilities, in her despair signs the official consent blank. Under Texas law this blank, under whatever harsh conditions procured (short of fraud), is sufficient to enable a court, uninformed of these conditions, to give her baby forever to persons unknown to her. . . .

This may be further illustrated by the frequently expressed attitude of the superintendents of some maternity homes. When asked why they refuse admission until after the mother has "signed away her baby," these women sometimes reply: "If the girl once sees her baby, or nurses it, she'll never give it up." In brief, these people are saying: "We are able to supply the baby market only by maneuvering the prospective mother into a choice between delivery on the highway and giving up her baby."

*Texas' Children: The Report of the Texas Child Welfare Survey 116-17* (University of Texas Bureau of Research in Social Science 1938) [hereinafter *Texas' Children*].

73. *Id.*

74. See Burton Z. Sokoloff, *Antecedents of American Adoption*, The Future of Children, Spring 1993, at 21-22.

75. We concede that we are drawing an inference, albeit a very plausible explanation, about the role confidentiality may have played based upon the clearly successful market that developed with the baby farms and upon the published descriptions of their practices. In contrast, Professor Hollinger provides a much more benign explanation in her presentation of the history of adoption practice:

Anonymity between birth parents and adoptive parents was more likely to prevail in placements made by agencies to which the child's custody had been voluntarily or involuntarily committed than in direct placements. This was due not to any clear policy favoring anonymity but to the incompleteness of the records kept by these agencies, as well as to the large numbers of parents who simply abandoned their children without any means of identification. These factors also made it extremely unlikely that adult adoptees would ever be able to ascertain the names or whereabouts of members of their original families.

Hollinger, *supra* note 19, at § 1-38.

to an adoption and eventually prompted legislation which transformed adoption from a privately negotiated contract to a highly regulated status. In 1917, Minnesota drove privately arranged or "independent" placements for adoption into court for review and approval, a stance it continues to take today.<sup>76</sup> It prohibited both the release or receipt of children outside the judicial process of adoption, thus ending the drift of surrendered children who were never formally adopted. In what was then the boldest response to the excesses of baby brokers, the Minnesota statute provided:

No person other than the parents or relatives may assume the permanent care and custody of a child under fourteen years of age unless authorized so to do by an order or decree of court. Except in proceedings for adoption no parent may assign or otherwise transfer to another his rights or duties with respect to the permanent care and custody of his child under fourteen years of age, and any such transfer hereafter made shall be void.<sup>77</sup>

Other states responded with less draconian measures, choosing instead to regulate child-placing agencies by prohibiting transfers without approval of a state agency,<sup>78</sup> by requiring reports of adoptive placements to a central state agency,<sup>79</sup> by requiring licensure, supervision and periodic inspections of any agency,<sup>80</sup> and by prohibiting adoption advertising.<sup>81</sup> The principle of public supervision of adoption was established and the modern child welfare system began to take shape.

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76. Minn. Gen. Stat. 1913, § 7151, as amended by 1917 Minn. Laws ch. 222, p. 335-37. See *infra* note 106 for the list of states, including Minnesota, that currently prohibit independent adoptions. As Howe has observed,

[O]ften the "private" or "independent" adoptive placement is nothing but a legal fiction that deems a direct placement is made whenever a natural parent voluntarily consents to a placement arranged by an attorney, physician, clergyman, or other third person intermediary chosen by the natural parent. Such independent placements often come under legislative scrutiny because of concern that trafficking in children leads to the making of illegal profits at the expense of a child's welfare.

Howe, *supra* note 19, at 176.

77. Minn. Gen. Stat. 1913, added by 1919 Minn. Laws, extra session, ch. 51, § 2. North Dakota enacted a similar statute, though it prohibited the assignments of children under the age of 18. 1919 N.D. Laws ch. 77, as amended by 1923 N.D. Laws ch. 152, § 1. As early as 1913, Minnesota had required reports of all children placed for adoption by agencies to the state board of control. Minn. Gen. Stat. 1913, § 6544, p. 1417.

78. See, e.g., Illinois, Smith's Rev. Stat. 1921, ch. 127, § 53, p. 1887.

79. See, e.g., N.Y. Dom. Rel. Law, § 114 (McKinney 1938), as amended by 1924 N.Y. Laws ch. 323. See also Peck, *supra* note 19, at 23 n.42.

80. See, e.g., North Dakota, 1923 N.D. Laws 162; Wisconsin, Wisc. Stat. 1923, § 58.03(1), p. 594.

81. See e.g., New Jersey, Act of Feb. 28, 1918, ch. 147, § 101, Acts of 1918, p. 343, as amended by Act of Apr. 11, 1919, ch. 97, § 2, Acts of 1919, p. 222.

*D. Twentieth Century Reforms: The Erection of the Wall of Secrecy*

Minnesota's regulation of placements for adoption was accomplished in a comprehensive revision of its existing adoption laws in 1917. Another notable consequence of that revision was the enactment of the first true confidentiality provision.<sup>82</sup> There were three additional features of the Minnesota revision: an investigation of every proposed adoption by a public agency; a transitional waiting period between placement and final decree; and potential annulment of a final adoption. Taken as a whole, these reforms provided somewhat greater protection for adopted children and a great deal more protection for would-be adopting parents. The Minnesota statute initiated a wave of similar reforms throughout other states.

Global supervision of adoptive placements was coupled with increased scrutiny of the particular proposed adoption. According to the Minnesota statute, the state board of control was invested with the responsibility to "verify the allegations of the petition, to investigate the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, and to make appropriate inquiry to determine whether the proposed foster home is a suitable home for the child."<sup>83</sup> Unfortunately, this salutary provision could be waived by the court "upon good cause shown, when satisfied that the proposed home and the child are suited to each other." We have no data showing how often or for what reasons the waiver power was used. Other states quickly incorporated investigation into their statutory adoption frameworks.<sup>84</sup>

Although also subject to judicial waiver, the Minnesota statute imposed a general requirement that a child must have lived for a certain length of time, usually six months, in the home of the adopting parents before an adoption decree could be granted. Again, this became a common feature of other states' laws.<sup>85</sup> Like the investigation requirement, the waiting period suspension, had a mixed purpose. Such provisions could operate to protect the child from an unsuitable home, especially when coupled with supervisory inspections during the period by state officials.<sup>86</sup> The adoptive parents were clearly protected against impulsive decisions to adopt, difficulties in adjusting to parenthood, or situations in which the child developed some intolerable defect. Although the Minnesota prototype did not specify what relief would be available if problems arose during the transition

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82. See *infra* note 91 for discussion of the slightly earlier New York statute.

83. 1917 Minn. Laws ch. 222, § 7152.

84. See New Mexico, 1925 N.M. Laws § 2. This statute made mandatory an investigation by State Board of Public Welfare.

85. Ohio, Gen. Code § 8030-1, *added by* Laws of 1921 (vol. 109), p. 180; Georgia, Act of Aug. 19, 1922, No. 521, § 8, Acts and Resolves of 1922, p. 75; North Dakota, 1913 N.D. Laws § 4446, *as amended by* 1923 N.D. Laws ch. 151; New York, N.Y. Dom. Rel. Law, § 112 (McKinney 1938), *as amended by* 1924 N.Y. Laws ch. 323; 1925 N.M. Laws § 2. Unlike these other statutes, the Virginia law and Vermont law required a waiting period of one year. Va. Code § 5333 (1919), *as amended by* 1922 Va. Acts ch. 484, p. 839; 1923 Vt. Laws No. 60, § 7.

86. See, e.g., the Va. Code § 5333 (1919), *as amended by* 1922 Va. Acts ch. 484, p. 839.

period, other states subsequently clearly authorized annulment of any interim adoptive placement orders. Whether the adopting parents could retreat from the adoption on demand if simply dissatisfied, is not at all clear.<sup>87</sup>

A retrospective summary of the purpose of the waiting period laws published in 1938 clearly indicates that the primary intended beneficiaries were the adopting parents and that the annulment power should be generously wielded. It recounts the problem that can occur when unexpectedly, the adoptive parents find they can conceive biological offspring. The emotional and financial stress of having two children, one biological and one adopted, may produce a "sorry" outcome.<sup>88</sup> Defects may also be manifested in the child. "These possibilities, far from being remote, have been known to every child guidance clinic, and every large juvenile court. The parents now come in begging piteously for relief from what they consider to be an unfair burden. The child, already suffering from his handicap, has to bear, with it, the burden of the parents' resentment."<sup>89</sup>

The desire to provide greater protection to adopting parents is more clearly demonstrated by the authorization for the subsequent annulment of the adoption if the adopting parents could demonstrate a pre-existing or genetic defect in the child. As the Minnesota statute provided: "If within five years after his adoption a child develops feeble-mindedness, epilepsy, insanity, or venereal infection as a result of conditions existing prior to the adoption, and of which the adopting parents had no knowledge, . . . the court may annul the adoption and commit the child to the guardianship of the state board of control."<sup>90</sup> This change discounted any interests

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87. Statutes enacted by Vermont and Virginia were quite open-ended, permitting annulment "for cause shown." The Vermont statute permitted the annulment of the adoption proceeding during the twelve months after filing in which it remained pending before the court. 1923 Vt. Laws No. 60, § 7. The Virginia statute permitted motions to annul by the biological parent, the original petitioner or the child by next friend during a similar twelve-month period. Va. Code § 5333 (1919), as amended by 1922 Va. Acts ch. 484, p. 839.

88. *Texas' Children*, *supra* note 72, at 117.

89. *Id.*

90. 1917 Minn. Laws ch. 222, § 7158. The Ohio statute enacted four years later is identical. Ohio Gen. Code § 8030-2, added by 1921 Ohio Laws 109, p. 180. The Virginia statute was much broader, permitting vacation of the decree without time limit or meaningful standard: if termination is "manifestly right and proper, and especially if it be for the best interests of the child." Its purpose is also more opaque, since this option is available to the biological parents as well as the adopting parents and child. Va. Code § 5333 (1910), as amended by 1922 Va. Acts ch. 484, p. 839.

The New York statute applied only to adoptions arranged by child-placing agencies. It more clearly extended the right of abrogation to the agency, on behalf of the child, as well as to the adopting parents. The grounds for agency abrogation were for violation of the foster parent's duties toward the child, including "cruelty, misuse, refusal of necessary provisions or clothing, or inability to support, maintain, or educate such child, or attempt to or actually change or fail to safeguard the religion of such child." N.Y. Dom. Rels. Law § 117 (McKinney 1938), as amended by 1924 N.Y. Laws ch. 323. The companion provision permitted adopting parents to petition for abrogation for the "wilful desertion from such foster parent, or of any misdemeanor, or ill-behavior" by the child. N.Y. Dom. Rels. Law 118 (McKinney 1938), as amended by 1924 N.Y. Laws ch. 323 (repealed 1974).

Often the adoption agreement could be undone years after the entry of a final decree. In an early New York case, *In re Souers*, 135 Misc. 521 (N.Y. Surrogate Ct., Westchester County 1930), a couple with substantial income had adopted a four year old child through a private charitable agency. When the child was seventeen years old, the adoptive parents petitioned the court to have the adoption abrogated

or needs of the child and instead, was explicitly aimed at reassuring adoptive parents and minimizing their risk.

Collectively, Minnesota's cluster of adoption reforms demonstrates a policy aimed at encouraging couples to accept a highly regulated and judicially supervised process by offering them equivalent or greater protections than they could obtain from private child-placing entrepreneurs. That context is also helpful in evaluating the purpose of the confidentiality provisions. The 1917 Minnesota adoption confidentiality provision was clearly devised to protect the adoption parties from the prying eyes of other citizens. It stated that, "The files and records of the court in adoption proceedings shall not be open to inspection or copy by other persons than the parties in interest and their attorneys and representatives of the State board of control, except upon an order of the court expressly permitting the same."<sup>91</sup> Obviously, since the birth parents, adopters, and adoptees had access to the court records and still appeared together in court, these states were not attempting to promote and preserve anonymity between the parties.

The 1926 Children's Bureau *Summary* of American adoption laws simply notes the Minnesota laws without comment concerning their intent, a striking departure from its usual expansive format.<sup>92</sup> The *Summary* does, however, note a report published by the Committee on Child Adoption in 1921, which five years

claiming that the child had disobeyed them his whole life and recently had disappeared with the family automobile. The court concluded that the child's behavior fell under the statute and nullified the adoption, dissolving all legal bonds between the child, including the child's loss of support and inheritance rights. The court sympathized with the adoptive parents because they had agreed to adopt a "dependent" child, not a "defective" child. Interestingly, though not recognized by the court, 4,000 years before the New York statute, the Code of Hammurabi recognized abrogation of an adoption if the son "transgresses against his foster-father." I Albert Kocourek & John H. Wigmore, *Evolution of Law, Sources of Ancient and Primitive Law* 387 (1915).

Although only these three states, Minnesota, Ohio, Virginia, and New York had enacted abrogation or annulment statutes by 1926, permitting such post-adoption relief became a pattern later. For modern law on annulment of adoptions, see Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. Fam. L. 549 (1983-84). See also Unif. Adoption Act, § 3-707, 9 U.L.A. (1994), which places a six-month time limitation for the filing of any challenge to a final decree, though it does not specify any grounds for challenge.

91. Minn. Gen. Stat. § 7159 (1913), as amended by 1917 Minn. Laws ch. 222, p. 337. North Dakota soon followed suit with a nearly identical statute. N.D. Comp. § 4446 (1913), as amended by 1923 N.D. Laws ch. 151.

Prior to these enactments, in 1916, New York became the first state to erect a partial shield surrounding adoption. The provision simply mandated that "the fact of illegitimacy shall in no case appear upon the record." 1916 N.Y. Laws ch. 453, § 113. There is no legislative history of this earliest statute. A New York City attorney, John Francis Brosnan, stated that concealing illegitimacy had been a "long-established rule of practice" in the New York Surrogate's Court, *The Law of Adoption*, 22 Colum. L. Rev. 332, 339 (1922). We cannot be certain whether the statute (or the practice) was intended to protect the adopted child from the social stigma of illegitimacy, Hollinger, *supra* note 19, at § 13-15, or to promote adoptions of younger children at a time when potential adopting parents were leery that illegitimates could inherit a "feeble-minded trait from their unwed mothers," Hollinger, *supra* note 19, at § 1-43. In any case, this statute did not prevent the public or the parties to the adoption from inspecting the record for other facts about the birth parents and the adopting parents.

92. See Peck, *supra* note 32, at 19.

later led to the recognition of adoption in Great Britain.<sup>93</sup> This British *Committee Report* recommended that all records of an adoption not be open to inspection by any person without an order of the court. As the *Report* explained:

[O]ur attention has been drawn to the lack of security felt in such cases by those who have taken permanent charge of a child. Possessing no definite legal rights over the child the foster parents run grave risks that at any time the natural parents may appear and disturb it, claim to take it away and even attempt to levy blackmail. The sight of the child after it has enjoyed all the advantages of a good home may awaken in the natural parents a desire to recover it. Witnesses have stated that it is no uncommon thing, when a child has reached an age at which it can work and earn wages, for parents who have habitually neglected it and left it to be brought up by a relative or even a stranger, to claim it back simply in order to take its earnings. . . . [M]any suitable people are deterred from coming forward to adopt a child by the fear of subsequent claims and the possible necessity, should they wish to retain it, of litigation uncertain in its issue. Such people would find encouragement in the knowledge that a definite legal status would be given to them as adopting parents and that any attempted interference by the natural parents could be summarily restrained.<sup>94</sup>

No mention is made of a policy of protecting a biological parent from the shame of having relinquished a child for adoption or to protect the child from the stigma of illegitimacy. The paramount intent was to protect the security of the adopting parents. Far more effective than restraining interference by unscrupulous biological parents after placement would be a provision that could shield adopting parents from disclosure of their identity. That was precisely the tack recommended by this British Committee:

50. Notice should be given to the registrar of births, deaths, and marriages in the district where the birth of the child was originally registered, that an order of adoption has been made by the court in question, and that the records of the court are filed in the court; *but such notice should not contain any information which would lead to the identification of the adopter.*

51. An office copy of the Order should be sent to the Registrar-General and after a lapse of time the other papers relating to the case might be deposited in a suitable public office. *Such papers should not be open to inspection by any person without an Order of the Court.*<sup>95</sup>

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93. See *supra* note 39 and accompanying text.

94. Home Department (Great Britain): Command Report of the 1921 Committee on Child Adoption ¶ 13.

95. *Id.* ¶¶ 50 and 51 (emphasis added). A second committee, the "Child Adoption Committee" was appointed by the Home Department in April 1924. Composed of an entirely different membership, its charge was quite similar to that of the earlier Committee on Child Adoption: to "report on the main



Without recorded legislative history we cannot confidently assess the influence that a British Report may have had on American legislation, but shortly after its publication, New York and Pennsylvania amended their laws to provide for comprehensive confidentiality.<sup>96</sup> In 1924, New York became the first state to seal adoption records from the view of both the public and the parties, although it left the issue to the trial court's discretion.<sup>97</sup> The only chinks in the secrecy created by

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provisions which in their view should be included in any Bill on the subject [of adoption]." Home Department (Great Britain): Command Report of the 1924 Committee Report at 3 (Apr. 6, 1925). The proper scope of confidentiality provisions continued to be a central feature of public debate:

A topic which has been the subject of much discussion before us is that of secrecy. There are those who attach great importance to an element of secrecy in adoption transactions and by secrecy is meant not merely that the transaction itself should not be a matter of common notoriety but that the parties themselves should not become known to each other, that is to say, that the natural parent shall not know where the child goes even though the adopters may know from whence the child comes. Certain of the Adoption Societies make this feature an essential part of their policy. They deliberately seek to fix a gulf between the child's past and future. This notion of secrecy has its origin partly in a fear (which a legalised system of adoption should go far to dispel) that the natural parent will seek to interfere with the adopter and partly in the belief that if the eyes can be closed to facts the facts themselves will cease to exist so that it will be an advantage to an illegitimate child who has been adopted if in fact his origin cannot be traced. Apart from the question whether it is desirable or even admissible deliberately to eliminate or obscure the traces of a child's origin so that it shall be difficult or impossible thereafter for such origin to be ascertained, we think that this system of secrecy would be wholly unnecessary and objectionable in connection with a legalised system of adoption and we should deprecate any attempt to introduce it.

*Id.* ¶ 28, at 9. This Committee recommended that authorizing the court to exclude the press and public from any hearing and limiting the public's access to adoption register information constituted an adequate response. However, in its proposed bill which ultimately was enacted, the Registrar-General was restrained from furnishing information from its records to "any person." "The Adoption of Children Act," 16 & 17 Geo. 5, ch. 29, § 11 (1926).

96. One group of scholars does assert that the original purpose of the confidentiality laws was to protect the adoptive family from blackmail or embarrassment by third parties such as reporters or "unscrupulous relatives." Sorosky et al., *supra* note 66, at 38.

97. N.Y. Dom. Rels. Law § 113 (McKinney 1938), as amended by 1924 N.Y. Laws ch. 323 provided in its entirety:

Order. — If satisfied that the moral and temporal interests of the person to be adopted will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption and directing that the person to be adopted shall henceforth be regarded and treated in all respects as the child of the foster parent or parents. If the judge or surrogate is also satisfied that there is no reasonable objection to the change of name proposed, the order must also direct that the name of the minor be changed to such name as shall have been designated in the [verified adoption petition]. Such order must be filed and recorded in the office of the county clerk of such county and shall be open to the public. The fact of illegitimacy shall in no case appear upon the record. The written report of the investigation, together with all other papers pertaining to the adoption, shall be kept by the judge or surrogate as a permanent record of his court, which may be sealed by him in his discretion and withheld from inspection by a proper order. No person shall be allowed access to such sealed records except upon an order of a court of record, and such order shall not be granted except on good cause shown.

this statute were that the change of name order remained a public document and that sealing was left to the discretion of the judge. Both of these holes were soon closed.

Even as late as 1925, some adopted children continued to use their surname of birth. A 1925 Pennsylvania statute provided: "If desired by the parties the decree may also provide that the person adopted shall assume the name of the adopting parent or parents." Like the earlier New York statute, it left the issues of records sealing to the discretion of the court.<sup>98</sup> Most states by the end of the 1930s required the issuance of an amended birth certificate for the adopted child and sealed the original. These statutes not only shielded the fact of illegitimacy but also the identities of the birth parents and also had significant symbolic value: "The adopted child was 'reborn' as the child of the new family, with a new identity and a new identification in the form of a birth certificate, exactly the same as if he/she was born to them. The original birth certificate with all of its debits was sealed up and replaced with a new amended one, replete with credits."<sup>99</sup>

Finally, in 1938, mandatory secrecy became state policy. New York amended its adoption laws to require the sealing of all adoption records, including the original birth certificate, and except upon court order, prohibited access to the public as well as the birth parents, adopting parents and the child. Furthermore, it apparently permitted only the adopting parents to object to any attempt to obtain information.<sup>100</sup> A book on adoption practice published in New York two years thereafter gives a contemporary opinion about the purposes of forced confidentiality: "Reporters nosing around for news might come upon something really juicy and publish it, causing untold suffering and permanent damage. Unscrupulous relatives could trace a child if they wished, and use their knowledge to upset a well-established relationship, if they did not do worse, and use it for actual blackmail."<sup>101</sup>

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The following year, Pennsylvania enacted an identical statute. 1925 N.Y. Laws Act 93, § 4.

98. 1925 Pa. Laws No. 93.

99. Sorosky et al., *supra* note 66, at 38.

100. The New York statute provided, in material part:

The written report of the investigation together with all other papers pertaining to the adoption shall be kept by the judge or surrogate as a permanent record of his court and such papers must be sealed by him and withheld from inspection. No person shall be allowed access to such sealed records except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for access and inspection shall be granted except on due notice to the foster parents and on good cause shown.

1938 N.Y. Laws ch. 606, p. 1615.

101. C.S. Prentice, *An Adopted Child Looks At Adoption* 62-63 (1940), *quoted in* Sorosky et al., *supra* note 66, at 38. Some judicial confirmation of that purpose can be found in the famous "Baby Lenore" case, *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 269 N.E.2d 787 (N.Y. Ct. App. 1971), *cert. denied*, 404 U.S. 805, 92 S. Ct. 54 (1971). The court observed that the policy of secrecy was necessary "to prevent the strife and harassment that could be caused by a parent. . . ." *Id.* at 793. Paradoxically, the court relied on that policy to deny the intervention by the adopting parents in a hearing on the revocability of the biological mother's surrender.

By 1949, the Children's Bureau recommended mandatory confidentiality as an "essential of adoption."<sup>102</sup> The only rationale given was that, "In the majority of cases privacy is desired by the parties concerned in an adoption. Records and papers contain very personal and intimate information that should be protected as confidential."<sup>103</sup> If states primarily wanted to protect the child from the stigma of illegitimacy, then more limited statutes that forbade the disclosure of the child's birth status would have sufficed. If the primary legislative purpose were to protect the birth parents and adopting parents against public invasions of their privacy, then the earlier Minnesota version that withdrew adoption record material from public access would have sufficed. Sealing the records to protect the members of the biological family makes little sense in view of the fact that the adopting parents would have known basic information from pre-adoption counseling or otherwise could have obtained information essential to the child's well-being on motion to the court. If the adoptive parents desired to annul the adoption, the biological parents were not necessary parties and need not be identified nor located for the proceeding.

Logically, the primary if not the exclusive intent of the mandatory confidentiality statutes must have been to protect the adopting family and induce them to adopt. Secrecy was a movement fueled by market forces. State regulated agency adoptions could not compete with private or independently arranged adoptions which promised secrecy and non-interference to the adopting parents. The economic depressions of the 1920s and 1930s created a surfeit of poor children whose birth families could not care for them at a time when would-be adopting parents able and willing to assume responsibility for an added family member were in short supply. During that time period, states enacted other incentives that were clearly aimed at protecting adopting parents but even these measures were insufficient. Mandatory confidentiality was the missing feature needed to attract adopting parents to the more highly regulated agency sector. Policymakers succumbed to the fears that without such protection, uncaring, even "unscrupulous" biological relatives, including the birth parents, would seek out the child and disrupt the adoptive family. Although there was no validation of that assumption at the time of the enactment of the first record-sealing statutes and recent studies discount it,<sup>104</sup> the assumption has persisted. As one veteran agency supervisor bluntly put it, "You wouldn't give a burglar the combination of your safe because you know he'd break in."<sup>105</sup>

### III. THE SHIFT IN THE AMERICAN ADOPTION PARADIGM

In what we tend to think of as the "traditional" secret model—though a tradition of only sixty years—adoption is arranged by intermediaries, either

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102. *Essentials of Adoption Law and Procedure* (Children's Bureau Publication No. 331-1949 (1949)).

103. *Id.* at 24. Today the requirement is nearly universal. See Stoxen, *supra* note 19, at n.44.

104. Paul Sachdev, *Unlocking The Adoption Files* (1989).

105. *Id.* at 186.

a public or private agency or an individual professional, usually an attorney.<sup>106</sup> Birth parents who are willing to surrender their child for adoption are paired by the intermediary with would-be adopting parents. The intermediary makes the matching decisions and usually is also responsible for transferring the physical custody of the child to the adopting parents. In an infant adoption, it is the intermediary who appears at the hospital to sign the medical release and who will deliver the child to the adopting parents who are eagerly waiting off-stage. Although most states require that non-identifying health histories of the biological family members be provided to the adopting parents,<sup>107</sup> the role of the intermediary is to insulate the parties from each other, precluding any personal exchange of information between the parties. Indeed, the intermediary is subject to contempt and sometimes criminal sanctions for violating the provisions of confidentiality.<sup>108</sup> During the pendency of the adoption, the court records are kept confidential, and upon the entry of a final decree, the records, including the original birth certificate, are sealed.<sup>109</sup> The official registrar of records is required to issue a new birth certificate which lists the adopting parents as the child's birth parents. The adopting parents' dates and places of birth are substituted for the original data of the birth parents.<sup>110</sup> In the legal paper trail of an adoption, the biological parents vanish from sight.

By the 1940s, social work professionals routinely counseled adopting parents that they should treat the adoption as if it had never happened:

[In nonrelative adoptions, agencies] often advised the parents against disclosing the adoptive status to the child and to treat him/her as if he/she were their natural born. Adoption became viewed as a means of providing a sense of fulfillment in the lives of infertile couples. The interests of the adoptee were held secondary to the interests of the adopters who were seen as doing the child a favor by taking him/her into their home. The motto was "a home for every child."<sup>111</sup>

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106. Only eight states forbid "private" adoptions arranged by the individual professional: Colorado, Colo. Rev. Stat. § 19-4-108 (1986); Connecticut, Conn. Gen. Stat. Ann. § 45-63(3) (West Supp. 1987); Delaware, Del. Code Ann. tit. 13 § 094 (Supp. 1986); Massachusetts, Mass. Ann. Laws ch. 210 2A (Michie/Law Co-op 1981) (Supp. 1987); Michigan, Mich. Comp. Laws Ann. § 710.41-.43 (West Supp. 1987); Minnesota, Minn. Stat. Ann. § 259.22(2) (West 1982; Supp. 1987); North Dakota, N.D. Cent. Code § 50-12-01-50-12-17 (1981 & Supp. 1999); Tennessee, Tenn. Code Ann. § 14-10-116 (1980); and possibly Ohio, O.R.C. § 5103.6 (Ohio Supp. 1996), as construed by *In re Adoption of Zschach*, No. 1994-CA-14, 1994 WL 779768 (Ohio Nov. 14, 1994). For a discussion of the policy implications of attempts to outlaw such adoptions, see William Meezan et al., *Adoptions Without Agencies: A Study of Independent Adoptions* (1978).

107. See, e.g., N.C. Gen. Stat. § 48-3-205 (1995); Wyo. Stat. Ann. § 1-22-116 (Michie 1999).

108. Section 7-106 of the Uniform Adoption Act (1994) prohibits the unauthorized disclosure of identifying information from adoption records and reports. The choice of enforcing penalties is left to enacting states. See, e.g., Iowa Code Ann. § 600.16 (West 1996); La. Ch.C. art. 1186.

109. Unif. Adoption Act, § 6-102, 9 U.L.A. (1994). See, e.g., S.C. Code Ann. § 20-7-1780 (Law Co-op. 1976); Utah Code Ann. § 78-30-15 (1953).

110. Unif. Adoption Act § 3-802, 9 U.L.A. (1994). See, e.g., Idaho Code § 39-258 (1998); Ala. Code § 26-10-4 (1975).

111. Sorosky et al., *supra* note 66, at 34.

However, by the late 1960s, adoption counseling practices changed. Adopting parents were encouraged to reveal to the child that he or she was adopted. In part, this change was a concession to the reality that the fact of adoption is hard to conceal, even if elaborate precautions are taken as illustrated by this reported encounter:

One woman who had a son of her own and subsequently adopted a second boy determined to keep the adoption secret and moved with her family to Florida severing all connections with her former friends and relatives. Eight years after her move, when her adopted son was nine, she was walking on the beach with her sons and bumped into a vacationing former acquaintance from New York. After expressing amazement at seeing her friend after all these years in such unlikely fashion, her first question was, "And which is the adopted one?" While for obvious reasons it is impossible to know how many adoptive parents in the last generation successfully kept their secret, the truth in many cases eventually came out—often with disastrous impact on the child or young adult. It is essentially for this reason—that the truth will out—that agencies have been so insistent that adoptive parents *must* tell the child, and tell him when he is very small, that he is adopted.<sup>112</sup>

More importantly, social scientists accumulated evidence that attempts by adoptive parents to supplant the biological parents by pretending that the child had no biological ancestry could be damaging to the child's orderly, normal development as well as to the adopting family's stability. According to Erikson, an essential task of human development is to appreciate and resolve questions of identity.<sup>113</sup> For the adopted child, this adjustment is complicated by his or her double identity: a genealogical and biological identity that differs from the social identity as a member of the adopting family. Revealing the fact of adoption to the child without a willingness and ability to discuss what is known about ancestral facts implies that those facts may be shameful and suppresses the child's normal and essential curiosity which, in turn, can jeopardize the adoptive parent's role as a trusted confidant.

The publication of *Shared Fate* by Canadian sociologist David Kirk confirmed these theoretical concerns by empirical research.<sup>114</sup> Kirk published his work in 1964, at a time when standard adoption agency practice clearly promised adopting parents a parenting role that was identical to the biological parent's rights and responsibilities, although disclosure of the fact of adoption was advised. Kirk's book became a turning-point in adoption practice. Using large data samples from three cities, Kirk sought to assess attitudes toward adoption from both the

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112. Rael Jean Isaac, *Adopting a Child Today* 1971 (1965).

113. Erik H. Erikson, *Identity: Youth and Crisis* (1968); Erik H. Erikson, *Childhood and Society* (1950).

114. H. David Kirk, *Shared Fate: A Theory of Adoption and Mental Health* (1964).

community and from adopting parents. He found a thinly disguised community rejection of the notion that the parental bond by adoption was or should be the same as the biological bond.<sup>115</sup> Kirk also found that due to community disapprobation, adopting parents had attempted to ignore the psychological fact that their role as parents was unique and inseparably linked to the child's biological identity. He theorized that secrecy contributed to the doomed pretence that the adopting family is no different from a biological family. Kirk reconceptualized the unique relationship between adopted parent and child as shared fate: just as the child must come to terms with his relatedness to a biological ancestry, so too the adopting parents must acknowledge the legitimacy of the child's task and accept it as their own as well.<sup>116</sup>

At about the same time that Kirk was questioning the wisdom of adoption counseling practices and the legal fiction that a complete substitution of families could be accomplished, adult adoptees began challenging the paradigm's permanency of secrecy. Two best-selling autobiographies detailing the persistent longing of the adopted child for information and reunion with biological relatives stimulated the growth of adoption search assistance groups.<sup>117</sup> Ultimately, that countermovement forced state legislatures to reexamine policies requiring permanent secrecy of adoption records. As a result, most states at least now permit

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115. When asked the open, global version of the question, would it be "natural" for a mother of two children, one adopted and one biological, not to know how to choose if both were drowning and she could save only one, 76% of the respondents thought this was a "natural" reaction. However, when probed by a question asking what such a mother should do, 46% of his citizen sample thought she should save her biological child; only 3% thought she should save the adopted child. Only 17% agreed to "the nearest one," while 29% refused to answer the imponderable. *Id.* at 26.

116. In today's research, Kirk's constellation of variables assessing the adjustment of the adopting family is still used. *Communication*: communication between the adopting parents and child about the adoption beyond simply telling the child about his adopted status; *empathy with the child*: the adopting parents' empathy for the child's connection to his birthfamily and its importance for the child's self-understanding and identity; *empathy for the biological parents*: the adoption parents' empathy for the biological parents' difficulty in making the adoption decision, understanding the biological parents' need for information about the child, and other attempts to view the adoption from the perspective of the adoptive parents; *acknowledgement of status*: acknowledgement that the adoptive family is different from the biological family and of the different issues it faces; *acknowledgement of the child's history*: interest in the child's history or background beyond medical information. These conceptualizations are taken from Harold D. Grotevant et al., *Adoptive Family System Dynamics: Variations by Level of Openness in the Adoption*, 33 *Fam. Process* 125, 132 (1994).

117. Jean Paton is generally credited as being the earliest pioneer in the movement to challenge the permanent anonymity of adoption. Her account of her successful attempts to find her biological mother was published as *The Adopted Break Silence* (1954). Thereafter she founded Orphan Voyage, a support group for adoptees. Similarly, after publishing her autobiographical account of the obstacles encountered in her search for biological parents, *The Search for Anna Fisher* (1973), Florence Fisher founded the Adoptees' Liberty Movement Association. For a discussion of the growth of adoption search assistance groups as well as self-help information, see Hal Aigner, *Faint Trails: A Guide To Adult Adoptee-Birth Parent Reunification Searches* (1986) and Cynthia D. Martin, *Beating The Adoption Game* (1988). It has been estimated that "at any instant, the total number of [adoption] triad members who are searching for each other is probably between 100,000 and 300,000, a number too large to pretend that everything is great in adoption today." Bill Perrin, *State's Adoption Policies Need to be Revised*, *The New Orleans Times-Picayune*, Oct. 8, 1990, at B6.

the adopted person to petition the adoption court for disclosure of information in the case of a medical emergency or other compelling necessity.<sup>118</sup> Furthermore, most states now provide for a voluntary registry which enables a registered adopted person, upon majority, to be reunited with his or her registered birth parents if a match of mutual interest can be made.<sup>119</sup>

Adoption practice has changed radically since the 1960s.<sup>120</sup> Agencies routinely now prepare a "Life story book" for a child placed for adoption, though the amount and type of information it contains will vary depending upon the degree of cooperation of the birth parents.<sup>121</sup> However, some reformers view these changes as insufficient and argue that matters of secrecy should be left to the individual preferences of the parties. There is a rich variety of contractual possibilities, and an increasing degree of participation by both the biological parents and adopting parents in the pairing or matching process before adoption. Birth parents are often given a book with biographical information and photographs describing potential adopting families from which to make a selection. Conversely, in this informal process, adoptive parents are provided with more biographical information about the biological parents than was traditionally available. In view of the relative scarcity of adoptable infants, usually the adoptive parents lack the luxury of choice among birth families; instead, their choice is simply a more informed one about accepting responsibility for this particular child. This heightened awareness of relevant facts by both parties is noncontroversial and is considered sound adoption practice by professionals.

As an added component, the birth parents and adopting parents may meet and exchange information face-to-face but without disclosing their full identities such as their complete names, work and home addresses. If adoption placement is elected by the birth parents before the child's birth, the couples may even decide

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118. See, e.g., Unif. Adoption Act, § 6-105, 9 U.L.A. (1994) which governs the availability of a civil action to obtain disclosure of adoption information that is not otherwise obtainable pursuant to § 6-103 (nonidentifying information) and § 6-104 (identifying information). See generally Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 Golden Gate U.L. Rev. 259 (1994).

119. A complete list is found in Hollinger, *supra* note 19, at § 13-A (Supp. 1995). Tennessee recently enacted substantial revisions to its sealed adoption records laws. As a matter of right, an adult adoptee is entitled to all records of his or her adoption except any home study of the adoptive parents. If a member of the birth family has signed a "contact-veto," the adoptee must agree not to attempt personal contact, on pain of criminal and civil penalties. Tenn. Code Ann. § 36-1-129 (1995). Alaska and Kansas permit adult adoptees to obtain copies of their original birth certificates which reveals the identities of the birth parents. Alaska Stat. § 18.50.500 (Michie 1991); Kan. Stat. Ann. § 65-2423 (1992).

120. The 1968 Child Welfare League of America's *Standards for Adoption Service* discouraged the transmission of detailed descriptive data about the birth family. Rev. §§ 4.12-4.15, CWLA, New York, 1968. That professional policy influenced practice in the 1970s. According to a Massachusetts adoption specialist, "[A]doption agencies shared very little other than medical background, if unusual, religion of the biological mother, if important to the parties, and the child's residential history from birth to adoptive placement." Elton B. Klibanoff, *Genealogical Information in Adoption: The Adoptee's Quest and the Law*, 11 Fam. L.Q. 185, 186 (1977).

121. P.H. Aust, *Using the Life Story Book in Treatment of Children in Placement*, 60 Child Welfare 535-60 (1987).

to permit the adoptive parents to accompany the pregnant mother to medical check-ups or the delivery itself.<sup>122</sup>

While any of those arrangements abridge traditional notions of secrecy in preparing for an adoption, none create what is usually thought of as an "open adoption." An open adoption is a process "in which the birth parents meet the adoptive parents, participate in the separation and placement process, relinquish all legal, moral, and nurturing rights to the child, but retain the right to continuing contact and to knowledge of the child's whereabouts and welfare."<sup>123</sup> Adoption specialists agree that the critical feature of an open adoption is that it envisions a continuing relationship between the birth and adopting family despite a final decree of adoption. That relationship contemplates both post-adoption information sharing about the child's development and personal contact between the birth family and the child. Even under an open adoption, the obligation to share information need not involve identifying information about the adopting parents' addresses and telephone numbers and visits with the child can be arranged through an intermediary such as a family friend or the adoption agency.<sup>124</sup> Of course, as long as personal contact with the child is a *sine qua non* of the model, limitations desired by the adopting parents may become impossible to achieve. At a very young age, children can memorize their addresses and telephone numbers.

Many adoption specialists believe that post-adoption contact arrangements should permit the parties to avoid face-to-face meetings between the birth family and the child if they want to ensure the security and privacy of the adoptive home. Aside from the conceptual baggage of an "open adoption," the label has connotative baggage. In common usage, "open" is an absolute term: "Not shut in or confined, not surrounded by barriers; to which there is free access or passage on all or nearly all sides; unenclosed, unwallled, unconfined."<sup>125</sup> Reformers have suggested the substitute term "cooperative adoption" which more fully reflects the notion that the parties to an adoption agreement are free to hand-tailor their arrangements and if desired, to avoid face-to-face contact.<sup>126</sup>

Today cooperative adoptions are negotiated by public and private agencies and by professional intermediaries with increasing frequency, despite the uncertainty of their performability or enforceability.<sup>127</sup> We now turn to a consideration of the

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122. Gloria Hochman & Anna Huston, *Factsheet: Open Adoption*, National Adoption Information Clearinghouse, Rockville, Md.

123. Annette Baran et al., *Open Adoption*, 21 Soc. Work 97, 97 (1976). For similar definitions, all centering on the maintenance of contact, ranging from visits to telephone calls to the exchange of photographs, see Amadio & Deutsch, *supra* note 15, at 61-62 (1983-84); and Laurie A. Ames, Note, *Open Adoptions: Truth and Consequences*, 16 L. & Psych. Rev. 137 (1992).

124. Kenny et al., *supra* note 12.

125. The Oxford English Dictionary (compact ed.) 1993 (1985).

126. Kenny et al., *supra* note 12. Professor Appell uses the term "collaborative adoption" in preference to cooperative adoption although she does not clearly distinguish between the two forms. Appel (1995), *supra* note 15. Because cooperative adoption is the term more widely used in practice and because it more nearly mirrors the process of our mediation model, we have elected to use that term as our model with that understanding of its meaning.

127. See *infra* text accompanying notes 305-316.



appellate decisions that have reviewed post-adoption contact agreements. Under the two-step analysis of the parental rights doctrine, if a court found a post-adoption contact agreement in addition to a surrender of all other parental rights, we might expect courts to honor the contact agreement, provided that the court found it to serve the best interest of the child. As we shall see, that has not been the path of the jurisprudence for most of the past sixty years.

#### IV. THE RESPONSE OF THE COURTS TO POST-ADOPTION CONTACT AGREEMENTS

Nationwide, only a handful of reported cases address the validity of a post-adoption contact agreement in an infant adoption by a non-relative.<sup>128</sup> Of these, six jurisdictions, Wisconsin, Arizona, Louisiana, Kansas, Ohio and New Jersey, have forcefully rejected the attempted reservation of visitation rights.

##### A. Decisions Refusing Enforcement of Post-Adoption Contact Agreements

Three rationales have emerged from these decisions: first, by authorizing adoption, legislatures have implicitly withdrawn the authority of the parties to alter their post-adoption relationship; second, such agreements are inseparable and inconsistent with a surrender for adoption; and, third, as a matter of public policy, such agreements are *per se* contrary to the best interest of the adopted child. The first basis, that the typical effects of adoption statute precluded the confection of any agreement by the parties that would permit a continuing relationship between the child and his biological relatives, was introduced by the Wisconsin Supreme Court in *Stickles v. Reichardt*. That decision clearly resulted from a statutory misconstruction in conflict with the parental rights doctrine and has been previously criticized.<sup>129</sup> *Stickles* has not been relied on or even cited by any subsequent appellate court.

The second rationale which conflates the adoption agreement with any purported agreement for continuing contact has proved to be more attractive to appellate courts.<sup>130</sup> In dictum in a Louisiana case, *Hill v.*

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128. Other reported decisions address the enforceability of post-adoption contact agreements in adoptions by relatives or foster parents of the child. Courts are split on enforceability. *See, e.g.*, cases refusing enforcement: *Lowe v. Clayton*, 212 S.E.2d 582 (S.C. 1975) (adoption of an older child by an aunt); *McLaughlin v. Strickland*, 309 S.E.2d 787 (S.C. Ct. App. 1983) (adoption of an older child by a stepparent). *Cf.* cases approving enforcement: *Weinschel v. Strople*, 466 A.2d 1301 (Md. Ct. Spec. App. 1983) (adoption of an older child by a stepparent); *In re Ruby T.*, 181 Cal. App. 3d 1201 (Cal. Ct. App. 1986) (adoption of older children by foster parent). The same policy concerns for the preservation of a preexisting relationship between the child and the biological parent are not present in infant adoptions by non-relatives. Thus, one should hesitate to infer that the courts of Maryland and California would enforce visitation agreements in infant adoptions. To avoid these problems of projecting future receptivity of state courts, we have limited our textual discussion only to decisions reviewing nonrelative adoptions.

129. *See supra* text accompanying notes 53-61.

130. In an intrafamily adoption, *In re Topel*, 571 N.E.2d 1295 (Ind. Ct. App. 1991), the opinion most baldly displays this thinking:

A decree of adoption severs forever every part of the parent/child relationship. The child

Moorman,<sup>131</sup> the Court of Appeals warned that the attempted reservation of visitation rights might jeopardize the adoption itself.<sup>132</sup> Similarly, in *In re Adoption of J.H.G.*,<sup>133</sup> the Kansas Supreme Court has also signaled that adoptive parents' promise of post-adoption contact could amount to misrepresentation or fraud sufficient to invalidate a birth parent's consent to the adoption.<sup>134</sup> However, in that case, the court also ducked the issue by finding that there was no "clear understanding and agreement as to what, if any, visitation would be allowed."<sup>135</sup>

Most recently, the Ohio appellate courts have flirted with this rationale in *In re Adoption of Zschach*.<sup>136</sup> In *Zschach*, the biological mother gave a written, unconditional consent to the adoption of her four-month-old child although she later attempted to prove a verbal agreement for continuing contact. As Justice Pfeifer characterized the mother's claim:

It was [the biological mother's] fear of not being able to see her daughter which set the series of events in motion. [The adopting mother] played on [the biological mother's] fears about [the biological father's intervention], and persuaded [her] to let the child stay with her, where [the

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is severed entirely from its own family tree and engrafted upon another. For all legal and practical purposes, an adopted child is the same as dead to its parents. The parents lose the right to ever see the child again. . . . We believe it is simply impossible for one to validly consent to the termination of all his parental rights; when, at the same time, he retains the right to exercise visitation privileges with that child. We hold that—as a matter of law—"consent" under such circumstances does not exist.

*Id.* at 1298-99. Subsequently, the Indiana legislature has approved post-adoption contact agreements for non-infant adoptions. See *supra* note 9.

131. 525 So. 2d 681 (La. App. 1st Cir. 1988).

132. In *Hill*, the court could avoid this issue because the mother failed to attack the adoption decree within the statutory time limitations. Subsequently, in *Dugas v. Dugas*, 614 So. 2d 228 (La. App. 3d Cir. 1993), another intermediate appellate court did invalidate the adoption. In that case, involving an older child with an established relationship with his grandmother, the court held that the grandmother's "reason or cause for entering into this agreement was based on the fact that although she would terminate her legal rights to Scotty, she would still retain visitation rights. Had she not been assured of that, we feel she would not have signed away her legal rights to her grandson. Therefore we find that there was error as to the nature of the contract." *Id.* at 232. Under prior law, a surrender for adoption could be challenged for error as well as fraud or duress. Under the current law, the validity of a surrender can be attacked only on grounds of fraud or duress and the appeal must be filed within 90 days of its execution or of entry of the adoption decree, whichever is earlier. La. Ch.C. arts. 1147-1148. Under the new, more limited statute, there are no cases challenging an adoption based on violation of post-adoption contact agreement.

133. 869 P.2d 640 (Kan. 1994).

134. Most of the opinion is devoted to the issue of the timing of the consent because the natural mother's consent to the adoption was given within 12 hours of birth and was thus voidable under Kansas law. Kan. Stat. Ann. § 59-2116 (1995). Here the court ultimately held that the mother's attempt to set aside her consent was not timely because a final decree of adoption had been entered prior to her action. In *In re Adoption of Hammer*, 487 P.2d 417 (Ariz. Ct. App. 1971), the Arizona Court of Appeals gave short shift to a challenge that promises of continued contact constituted extrinsic fraud vitiating the mother's consent, although the court may also have been troubled by the fact that this was an oral agreement.

135. *J.H.G.*, 869 P.2d at 648.

136. No. 1994-Ca-14, 1994 WL 779768 (Ohio Nov. 14, 1994).

biological father] would not be able to find her. [The biological mother] claims that she consented to the adoption only because [the adopting mother] agreed to allow [the biological mother] and her other children be a part of the baby's life. The agreement apparently was that [the biological mother] and her children would be referred to as the baby's aunt and cousins. [The biological mother] believed she was consenting to an open adoption.<sup>137</sup>

The Ohio Court of Appeals ultimately held that a genuine issue of material fact existed as to whether the mother's consent had been fraudulently induced by promises of post-adoption visitation.<sup>138</sup> The Ohio Supreme Court reversed, affirming the trial court's grant of summary judgment. It avoided confronting the issue of the unity of the adoption contract and post-adoption contact agreement by finding insufficient evidence to support the mother's allegations that her consent to adoption was the product of fraud, misrepresentation or undue influence.<sup>139</sup>

The issue was more bluntly raised by the putative father's claim in *Zschach*. His agreement with the adopting mother explicitly stated that his consent to the adoption was "conditioned" upon the grant of visitation "to include at least twenty hours per month in the Final Decree of Adoption."<sup>140</sup> Moreover, the agreement provided that, if the visitation rights were not included in the decree, then "this consent shall be null and void."<sup>141</sup> The interlocutory order of adoption included the visitation agreement, but the final decree granted almost two years after the child's birth did not incorporate the visitation agreement. The Ohio Court of Appeals held that the natural father's consent conditioned on post-adoption visitation rights was tantamount to a written objection to the adoption, noting that the Ohio law governing adoptions does not recognize a partial consent to an adoption by one who has a statutory right to withhold such consent.<sup>142</sup> Again, the Ohio Supreme Court reversed and again avoided a definitive resolution of the issue by holding that the contact agreement was not the equivalent of the statutory right of putative fathers to file an objection to the adoption. By not properly preserving his claim, the father's constitutional rights had not been violated by the trial court's failure to grant him a hearing on visitation rights before stripping that provision from the final decree of adoption.<sup>143</sup>

If like the putative father's surrender in *Zschach*, a parent's adoption consent is expressly conditioned upon the reservation of continuing visitation rights, then upon breach of the condition by the adopting parents, standard contract theory would provide the parent with complete remedies, including rescission of the contract to adopt. Recharacterization that the adopting parent's covenant to ensure

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137. 665 N.E.2d 1070, 1083 (Ohio 1996) (Pfeifer, J., dissenting).

138. No. 1994-CA-14, 1994 WL 779768 (Ohio Nov. 14, 1994).

139. *Id.*

140. 665 N.E.2d at 1071.

141. *Id.*

142. No. 1994-CA-14, 1994 WL 779768, at \*2 (Ohio Nov. 14, 1994).

143. 665 N.E.2d 1070 (Ohio 1996).

continuing access to the child fraudulently induced the parent to consent to the adoption would also produce nullification of the adoption. In such instances in which the biological parent expresses such ambivalence about his consent to the adoption, the trial court should find that his consent is not freely and voluntarily given and refuse the proposed adoption. To avoid such uncertainty, a legislature following the Uniform Adoption Act model might decide to withdraw the remedy of adoption rescission despite the confection and later breach of a post-adoption contact agreement.<sup>144</sup> With that pronouncement in place, parties choosing to agree to continuing contact would be clearly aware that the agreement to adopt and the agreement for continuing contact were independent obligations.

But ordinarily, the parties intend that the contract to adopt and any contract for post-adoption contact are independent and severable agreements. The clearest example of such arrangements was presented to the New Jersey Supreme Court in *In Re D.M.H.*<sup>145</sup> During the mother's pregnancy, the adoptive parents transported her to the clinic for prenatal visits and fully discussed the mother's hopes that she could remain "a big part of the baby's life" not as a full-time parent but as a "nannie" or "Aunt Jennie."<sup>146</sup> Five days after the birth of her child, the mother gave the child into the adopting parents' custody. Three months later, the mother signed a consent form for the adoption. Although no written agreement was executed nor mentioned in the consent form, the trial court found that the adoptive couple promised the natural mother, while still pregnant, that she could "visit with the child and be informed as to the child's progress" after the adoption.<sup>147</sup> During the first year, the arrangement was honored. The mother called the adoptive parents about once a month to ask about the child's development and to obtain photographs of him. The parties had dinner together when the child was six months old. When the child was ten months old, the adoption petition was filed. Shortly thereafter, the amiability of their continuing relationship shattered.

The Court found that two contracts had been reached by the parties: a surrender of parental rights and an acceptance of parental obligations by the adopting parents, and an agreement for continuing visitation. The confection of two contemporaneous agreements both involving the same subject matter poses thorny interpretational questions under contract law. Do the two contracts merge so that a reservation of the lesser right to continued visitation becomes a condition essential to the enforcement of the greater promise to surrender the child for adoption?<sup>148</sup> Is the denial of visitation fraudulent conduct by the adopting parent justifying the rescission of the adoption? Conversely, can the presence of two separate contracts be interpreted as independent agreements?

If the answer turns on the intent of the parties, then the independent contracts interpretation would appear to be the correct one. In *D.M.H.*, the biological mother and the adopting parents avoided any appearance of condition by executing a

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144. See *supra* note 13 for the text of the Comments to § 1-105 of the Uniform Adoption Act.

145. 641 A.2d 235 (N.J. 1994).

146. *Id.* at 237.

147. *Id.*

148. See E. Allan Farnsworth, Contracts § 8.4 (1982).

standard unconditional adoption agreement and yet agreed to a wholly separate contract for continued visitation by the mother. The mother perceived that she could not adequately care for her child and believed that adoption, rather than some other temporary custodial arrangement, was in the child's best interest. By agreeing to adoption, she acknowledged that her legal status as parent would end; no longer would she have priority as the legal representative of her child during minority nor would they have any inheritance rights from each other. She was also willing to grant to the adopting parents not only possessory rights to the child's custody but also the right to control the child's behavior and make all decisions concerning the child's person and property—*except* the right to cut off all future relationship between the mother and her child. The adopting parents agreed to adopt the child and by the separate contract, to waive their right to control their child's associations by permitting a relationship with the mother, albeit a nonparental role of a fond relative.

When the mother pressed to see the child and personally give him his present for his first birthday, the adoptive parents balked but eventually relented. Apparently due to this disagreement, the mother filed suit to regain custody and to block the adoption. At issue at the adoption hearing was whether the visitation agreement vitiated her consent to the adoption.<sup>149</sup> The New Jersey Supreme Court properly ruled that proof of a post-contact agreement does not give a biological parent the right to rescind a surrender and, thus, to annul an otherwise valid adoption by non-relatives. In justification, the court simply noted that the legislature had not recognized post-adoption contact rights and thus a surrender could not be conditional. Because the remedy sought by the biological mother in *D.M.H.* was annulment of the adoption rather than enforcement of the post-adoption contact agreement, the court stated that it "need not and do[es] not address or resolve the validity of a voluntary and consensual open-adoption agreement."<sup>150</sup> But the court then proceeded to address such agreements and clearly signaled that it was not receptive to their enforcement.<sup>151</sup>

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149. An alternative theory offered for affirming the adoption was that no consent of the mother was needed due to her misconduct toward the child. Using an extremely expansive definition of abandonment, the court found abandonment. Abandonment is typically defined as the "settled intent to permanently forego all parental rights and obligations." See, e.g., *O.S. v. C.F.*, 655 S.W.2d 32 (Ky. Ct. App. 1983); *Matter of Burney*, 259 N.W.2d 322 (Iowa 1977). Most courts would not have found abandonment when both an agreement and the mother's post-adoption contact were proved.

150. *D.M.H.*, 641 A.2d at 245.

151. In *D.M.H.*, the court defined open adoption, distinguished between relative and non-relative adoptions and noted that the majority of other states refused to recognize birth parent visitation in non-relative adoptions. Though uncited by the Supreme Court, in two earlier cases, lower appellate courts of New Jersey had approved the preservation of birth parent visitation rights by court orders in relatives' adoptions: *In re Adoption of Children by F.*, 406 A.2d 986 (N.J. Super. Ct. Ch. Div. 1979) (stepparent adoption) and *Kattermann v. DiPiazza*, 376 A.2d 955 (N.J. Super. Ct. App. Div. 1977) (grandparent adoption). The court pointed out that a proposed 1993 statutory amendment authorizing consensual visitation or communication between the birth parent and the adopted child in a non-relative adoption had been rejected by the New Jersey legislature. Finally, the court commented: "The trial court determined . . . that the child had fully bonded to his adoptive parents" and "that [the mother] Miss H is to [the child] . . . for all practical purposes a complete stranger." 641 A.2d at 245. Most infant

In disputes in which the biological parent seeks only enforcement of the post-adoption contact agreement, there is no claim that the adoption should be disturbed. The validity of the adoption need not and should not be affected at all by the contact agreement, provided that the parties fully understand and accept the separateness of their transactions. Family law has long recognized different species of authorized relationships with children: first, full custodial authority or natural guardianship of the child's person and property, such as that exercised by both parents in an intact family; second, separate guardianships—guardianship of the child's property and guardianship of the child's person; and, third, upon divorce, sole (or exclusive) custody as well as joint custody; and visitation rights.<sup>152</sup> A biological or adoptive parent, often a grandparent, and sometimes a step-parent may claim visitation rights without seeking the status of a parent and the more expansive powers of custody.<sup>153</sup> A claim to visitation is a lesser and independent right. Recognition of the more limited visitation claim serves an important social need to avoid full-blown custody disputes and to match the remedy with the petitioner's ability to sustain only a relatively limited relationship with the child. Similarly, Anglo-American law has long recognized that a parent may voluntarily contract away any of the separate and separable powers and rights he or she may have regarding the child.<sup>154</sup> No prior court approval is required for the performance of such contracts and the parent is bound, subject only to a reviewing court's jurisdiction to enforce, modify or abrogate them if proof is made that they do not serve the child's best interest.

The third rationale cited by courts that have refused enforcement of post-adoption contact agreements is that they are per se not in the child's best interest. Like the Wisconsin Supreme Court in the *Stickles* case,<sup>155</sup> these courts have not focussed on the needs of the particular child in the dispute by requiring evidence of his or her needs, but instead have relied on global assertions of children's needs. In essence, such assertions amount to a finding that continuing contact agreements violate a public policy of protecting children.

In *In the Matter of the Adoption of Hammer*,<sup>156</sup> the Arizona Court of Appeals also refused enforcement of a visitation agreement with little illumination of the supposed dangers to the child. As it characterized the birth mother's assertions:

[The birth mother] alleged the existence of a secret agreement between herself and the adoptive parents under which the adoptive parents agreed that [she] would continue to live with the adoptive parents "as long as possible"; that [the birth mother] would continue to have full and liberal

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adoptions by non-relatives could be similarly characterized. The language of the *D.M.H.* opinion indicates that without a legislative endorsement of post-adoption contact agreements, the New Jersey Supreme Court is unlikely to enforce them.

152. Homer H. Clark, Jr. & Carol Glowinsky, *Domestic Relations: Cases and Problems* 665-671 (5th ed. 1995); Boskey, *supra* note 17.

153. See *infra* note 239.

154. See discussion of the parental rights doctrine *supra* Part II, text accompanying notes 20-38.

155. See *supra* text accompanying notes 53-61.

156. 487 P.2d 417 (Ariz. Ct. App. 1971).

rights of visitation with her [two daughters] and that the adoptive parents would not attempt or seek to alienate the minor children's affection from their natural mother. The petition went on to allege that this agreement was fulfilled until May of 1967 [three years after the final decree of adoption] when the adoptive parents moved to the State of Michigan and there [the birth mother's] visitation rights were denied and the children's affections were alienated.<sup>157</sup>

A breach of any such agreement cannot constitute a ground for vacating a final decree of adoption because such an agreement is "contrary to the purpose and intent of our adoption laws and certainly detrimental to and against the best interests of the adopted child."<sup>158</sup>

In *Hill v. Moorman*,<sup>159</sup> the biological mother consented to the adoption of her twenty-month-old child. In exchange for her consent, the adoptive parents signed a document giving the mother "reasonable visitation rights." When they reneged on the visitation agreement after the adoption was finalized, the mother sought to enforce the agreement. The Louisiana Court of Appeal held that the post-adoption visitation agreement was "against public policy".<sup>160</sup>

An agreement providing for visitation by a third party would impair the adoptive parents' rights. Such an agreement might also impair the new parent-child relationship with very undesirable consequences.<sup>161</sup>

Like the earlier Arizona decision, in denying enforcement to the agreement, the Louisiana court's opinion does not amplify upon what public policy is offended, the nature of the impairment, or the undesirable consequences.

In the *Zschach* case, the Ohio Supreme Court similarly found that post-adoption contact agreements violated public policy. As the Court interpreted the legislative purpose underlying adoption:

[This statute] reflects the legislature's intent to find families for children. In [*Adoption of*] *Ridenour*<sup>162</sup> we commented upon the legislative purpose behind such a proscription as follows: "If preconditions are imposed on

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157. *Id.* at 419.

158. *Id.* at 420.

159. 525 So. 2d 681 (La. App. 1st Cir. 1988).

160. *Id.* at 681-82.

161. *Id.* at 681-82.

162. 574 N.E.2d 1055 (Ohio 1991). In *Ridenour*, the court reviewed an adoption which did not raise the issue of any agreement for visitation rights. At stake, instead, was the authority of a trial court to impose grandparent visitation rights upon the adopting parents or to deny the adoption if they objected. Two sisters, aged 21 months and seven months, were removed from their father's care after the death of their mother and placed in foster care, subject to visitation rights in favor of the children's paternal grandparents and maternal grandparent. Two years later when the foster parents sought to adopt the girls, the trial court refused the adoption because "of the difficulties it would create for grandparent visitation rights." *Id.* at 1059. The Ohio Supreme Court reversed finding the trial court had abused its discretion in refusing the adoption and was without authority to "consider the possibility of post-adoption visitation by biological grandparents following a stranger adoption." *Id.* at 1060.

the adoptive parent-child relationship, or if adoptive parents are forced to agree to share parenting responsibilities with people whom they do not know, many potential adoptive parents will be deterred from adopting. Moreover, even where adoptive parents consent to visitation by biological relatives whom they do not know, such an arrangement is bound to be stressful for the child, particularly where the parties are not favorably disposed toward one another."<sup>163</sup>

Thus, the Court assumed, without citing any authority, that even consensual visitation is inherently harmful to the child. Although the *Zsach* case presented the Ohio Supreme Court with an opportunity to recognize the distinction between court-ordered and consensual visitation, it declined finding no legislative approval of either alternative. As Justice Pfeifer lamented in his dissent:

If we were able to do the fair thing in this case, it would be to order the parties to carry out the agreement they originally intended—custody to the adoptive parent with visitation by the natural parents. However, Ohio does not recognize “open” adoptions—pursuant to [our effects of adoption statute], biological parents lose all parental rights when their child is adopted. . . . Thus, we are forced to fit this most unusual scenario into a statutory scheme with “one size fits all” rules.<sup>164</sup>

#### *B. Decisions Approving Enforcement of Post-Adoption Contact Agreements*

Asbsent explicit legislation, only the appellate courts of Connecticut and Massachusetts have recognized the validity and enforceability of post-adoption contact agreements.

In *Michaud v. Wawruck*,<sup>165</sup> the Connecticut Supreme Court held that post-adoption visitation agreements do not violate public policy and are enforceable if in the best interest of the child. The opinion does not recite the full history of the child, but at some early point in her life, the child apparently was removed from her mother's care and was placed in foster care by the state. She was two-and-one-half-years old when her mother's parental rights were terminated. Thereafter, the mother sought to set aside the termination order on grounds that her consent had been fraudulently procured by the child's father. In a clear compromise of that lawsuit, the foster parents who wanted to adopt the child and the mother entered into a written agreement.

Unlike the other reviewed cases, this agreement is quite detailed, probably because the public adoption agency was involved in the negotiations. The agreement, labeled “Open Adoption and Visitation Agreement,” unambiguously stated that the parties would cooperate with the agency in the completion of the

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163. In re Adoption of *Zsach*, 665 N.E.2d 1070, 1074 (Ohio 1996).

164. *Zsach*, 665 N.E.2d at 1082 (Pfeifer, J., dissenting). Subsequently, the Ohio legislature has authorized post-adoption contact agreements. See *infra* Part VI.

165. 551 A.2d 738 (Conn. 1988).



adoption and that the birth mother would withdraw her motion to set aside the termination of her parental rights. The visitation provisions were set out in a separate paragraph:

The adopting parents will cooperate fully with the natural-mother in the natural-mother's visits with the child both now and after the adoption takes place until the child's 18th birthday. The parties agree to be guided in carrying out this provision by the present laws of Connecticut regarding reasonable visitation . . . as they pertain to visitation rights of non-custodial parents in dissolutions of marriage. The tender age of the child and her high sensitivity to her, up to the present, state of uncertainty shall be taken into account by the parties. Each of the parties shall at all times in good faith endeavor to maintain in the child respect and affection for the other parties. The rights of visitation shall not be exercised by the natural mother at any time or in such a manner as to interfere with the education and normal social and school activities of the child. Visitation shall be twice a month for three (3) hours each visit at the Wawrucks' home.<sup>166</sup>

After the adoption was finalized, the adopting parents refused to honor the agreement and cut off the mother's visitation. The birth mother responded by seeking specific enforcement of the agreement.

The trial court, echoing the sentiments of other courts, held that existing adoption statutes precluded private agreements that would perpetuate a relationship between the birth family and the adopted child. The Connecticut Supreme Court reversed, finding that open adoption agreements were not expressly forbidden<sup>167</sup> and were potentially enforceable. On remand, the trial court was to determine if enforcement would continue to serve the child's best interest.<sup>168</sup>

The only ambiguity in *Michaud* is whether the authorization of open adoption arrangements applies to any adoption, even infant adoptions in which there is no claim of a psychological bond between the birth parent and child. The opinion does not present any details concerning the degree of bonding between the natural mother and child, who at best was three-years-old when visitation ceased. The broad language of *Michaud* seems to authorize open adoptions in general

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166. *Id.* at 739 (citation to Connecticut statutes omitted). Although the agreement was recorded with the court, it was not incorporated into the final decree of adoption.

167. Although Connecticut has no statute authorizing an open adoption, the court nevertheless looked to the general visitation statute in the Family Law chapter entitled "Dissolution of Marriage, Legal Separation and Annulment." Conn. Gen. Stat. § 46b-59 (1994). By interpreting this statute very broadly to encompass adoption proceedings as well as dissolution actions, the court held that the judiciary has great discretion "to grant the right of visitation with respect to any minor child . . . to any person" and the only criterion under the statute is the best interest of the child. *Michaud*, 551 A.2d at 741. The court also perceived the critical distinction between visitation rights and custody/parental status. Thus, the visitation rights accorded the natural mother in *Michaud* need not infringe on the adoptive parents rights to control and custody.

168. For a discussion of such a fact-finding hearing, see *Smith v. Brett*, No. FA93 030 76 90 S, 1994 WL 411003 (Conn. Super. Ct. July 29, 1994), and the text accompanying *infra* notes 303-315.

regardless of whether the birth parent's claim is based on a developed or potential relationship with the child.<sup>169</sup>

While the Connecticut Supreme Court opinion properly separates the issue of post-adoption parental status and post-adoption visitation, it does not provide much discussion of how public policy is served by the enforcement of the parties' agreement. In the only passage that addresses this issue, Justice Peters wrote:

We are not prepared to assume that the welfare of children is best served by a narrow definition of those whom we permit to continue to manifest their deep concern for a child's growth and development. The record . . . demonstrates that, in the present case, the "Open Adoption and Visitation Agreement" was openly and lovingly negotiated, in good faith, in order to promote the best interest of the child. The attorney for the child reported that the child thought the agreement between her mother and her soon-to-be adoptive parents would be "the best world that she could imagine." This agreement did not violate public policy.<sup>170</sup>

Massachusetts is a state that has long approved post-adoption contact agreements even in infant adoptions. In a 1973 case, *Adoption of a Minor*,<sup>171</sup> the Supreme Judicial Court considered a visitation agreement concerning a newborn placed several days after birth with prospective adopting parents before any meaningful relationship could have developed between the natural mother and the child. The birth mother agreed to consent to the adoption in return for visitation rights. The adopting parents then signed a document allowing visitation at "all reasonable times" at their residence. Six months later, before the adoption was finalized, the natural mother sought to withdraw her consent even though the prospective adopting parents had fully complied with the visitation agreement. The mother argued that, because her consent was conditioned on post-adoption visitation rights, it was invalid and against public policy.

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169. The court observed:

The plaintiff's rights are not premised on an ongoing genetic relationship that somehow survives a termination of parental rights and an adoption. Instead, the plaintiff is asking us to decide whether, as an adult who has had an ongoing personal relationship with the child, she may contract with the adopting parents, prior to adoption, for the continued right to visit with the child, so long as that visitation continues to be in the best interest of the child.

551 A.2d at 740-741 (Conn. 1988). Citing this passage, Professor Appell gives a limited holding to *Michaud*, noting that the open adoption agreement was between adoptive parents and a biological mother who had an ongoing relationship with the child. Appell (1995), *supra* note 15, at 1039.

However, later in its opinion, at 741-42, the court is more expansive:

Similarly, *Weinschel v. Strople*, 56 Md. App. 252, 261, 466 A.2d 1301, 1305 (Md. Ct. Spec. App. 1983), concluded, *as do we*, that as long as the best interest of the child is the determinative criterion, public policy does not forbid an agreement about visitation rights between a genetic parent and adoptive parents.

(Emphasis added).

170. *Michaud*, 551 A.2d at 742.

171. 291 N.E.2d 729 (Mass. 1973).

The appellate court held that the visitation agreement between the natural mother and adoptive parents was not against public policy and could even be incorporated into the adoption decree. The court did not rely upon any statutory authority, stating simply that the welfare of the child was its "supreme inquiry."<sup>172</sup> Thus, the agreement would be enforceable only to the extent that it advanced the child's welfare. Any provision that granted the natural parent "a legal right overriding the welfare of the child" would be against public policy, but only that "offending provision would be unenforceable."<sup>173</sup>

In sum, whether rejecting or upholding attempted post-adoption contact agreements, appellate court opinions have displayed a superficial analysis of their effect upon the child's best interest. Especially striking is the fact that courts appear disinterested in the findings of social science research. Although legal doctrines developed in earlier centuries have been criticized for their blindness to the child's interests in disputes over the child's care and control, the systematic study of childhood and child development did not occur until the late nineteenth century.<sup>174</sup> Until proof accumulated that childhood experiences profoundly affected human development and research was able to identify children's needs at each stage of their development, the law's inattention to a child's emotional and psychological needs is at least understandable and perhaps justifiable.

However, the same defense cannot be asserted for the jurisprudence of the last half-century. As these cases illustrate, courts are still making sweeping assumptions,<sup>175</sup> citing mysterious "very undesirable consequences" for the new adoptive

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172. *Id.* at 731. The court noted that a recent amendment to the adoption statute requires the words "unconditionally surrender" in the prescribed consent to adoption form. *Id.* However, this amendment did not apply retroactively in this case. There are no subsequent reported Massachusetts cases interpreting the *Adoption of a Minor* holding in light of this amendment. However, there are subsequent decisions that approve the inclusion of continued visitation agreements within public agency permanency planning for children whose parental rights have been terminated. See *Adoption of Adam*, 500 N.E.2d 816 (Mass. App. Ct. 1986); *Adoption of Abigail*, 499 N.E.2d 1234 (Mass. App. Ct. 1986); *Petition of the Dept. of Soc. Services to Dispense with Consent to Adoption*, 467 N.E.2d 861 (Mass. 1984).

173. *A Minor*, 291 N.E.2d at 731.

174. As late as the nineteenth century, childhood was viewed merely as a state of physical maturation for the individual whose characteristics and abilities were fixed at birth. See, e.g., Jean Jacques Rousseau, *Emile: or, On Education* (A. Bloom trans. 1979). At least one authority has postulated that scientific interest in human behavior was first sparked by the publication of Darwin's theories of evolution in 1859. Before then, inquiry into the nature and development of men and women was within the province of theologians and philosophers. Paul H. Mussen et al., *Child Development and Personality* 9 (4th ed. 1974). Darwin's macrocosmic work suggested the theory that there might well be an parallel evolutionary process at work at the microcosmic level in individual human development which would affect adult personality and behavior. An American experimental psychologist, G. Stanley Hall of Clark University, is generally credited with producing the first systematic study of child development. G. Stanley Hall, *The Contents of Children's Minds on Entering School*, 1 *Pedagogical Seminary* 139 (1891). Since then, of course, there has been an explosion of research. See, e.g., Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, especially *Legal and Behavioral Approaches to Children's Suggestibility: 1900-1985 and The Recent Past: Changes in Legal and Behavioral Approaches* 47-74 (1995).

175. The exceptional discussion is found in the New Mexico Court of Appeals opinion in *In re the Adoption of Francisco A.*, 866 P.2d 1175 (N.M. Ct. App. 1993), a contest concerning older children

parent-child relationship<sup>176</sup> and concluding that "such an arrangement is bound to be stressful for the child."<sup>177</sup> Harm is deemed axiomatic: "The obvious problems, emotional and otherwise, which would likely result from such interference [by biological parents] to the detriment of the child, and efforts of the adoptive parents to properly rear the same, are too basic and numerous to here require any elucidation or enumeration."<sup>178</sup>

In the next section, we will examine those assumptions in light of a growing body of social science research.

#### V. SOCIAL SCIENCE RESEARCH ON THE EFFECTS OF OPENNESS IN THE ADOPTION PROCESS

In part, judicial assumptions about the destructiveness of post-adoption contact agreements may be attributable to the dominance of the psychoanalytical theory of human development during this century. As Silverstein and Demick note, this theory focussed on individuation, separation of the self from others, beginning with the mother, as the most important task of healthy maturation.<sup>179</sup> Theorists of this school, such as Kraft and her colleagues, warned that openness in adoption can cause serious adjustment problems for all parties to an adoption. Continued contact can interfere with the biological parent's grieving and separation from the relinquished child; can interfere with the child's need for a safe, psychological space for the unfolding of development and with the child's attachment to the adoptive parents; and can interfere with the adopting parents' sense of security and permanent attachment to the child.<sup>180</sup>

As Silverstein and Demick describe the influence of psychoanalytical theory in shaping policies of confidentiality and secrecy:

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between a former foster parent and the agency selected adoptive couple. A divided Court reversed the grant of court-ordered visitation rights to the former foster parent. The special concurrence by Judge Hartz, at 1188-1190, identifies three policy considerations at stake in post-adoption visitation, though his analysis is not limited to consensual agreements. Does such visitation serve the child's best interest? Who should make the determination of the child's interests, the courts or the adoptive parents? Will adoption be discouraged if the state can order post-adoption visitation? Furthermore, in discussing the child's best interest he reports relevant social science research.

176. Hill v. Moorman, 525 So. 2d 681, 682 (La. App. 1st Cir. 1988).

177. In re Adoption of Ridenour, 574 N.E.2d 1055, 1063 (Ohio 1991), *quoted with approval in* In re Adoption of Zschach, 665 N.E.2d 1070 (Ohio 1996).

178. McDonald v. Berry, 134 S.E.2d 392, 393 (S.C. 1964).

179. Deborah R. Silverstein & Jack Demick, *Toward an Organizational-Relational Model of Open Adoption*, 33 Fam. Process 111 (1994). See also McRoy et al., *supra* note 14, especially Chapter 3 for a discussion of other theoretical perspectives on adoption.

180. In 1985, they published a trilogy of influential articles summarizing extant research and calling for a reappraisal of the wisdom of open adoptions: Arienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions, Part I: The Birth Mother*, 2 Child & Adolescent Soc. Work J. 13 (1985); Adrienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions, Part II: The Adoptive Parent*, 2 Child & Adolescent Soc. Work J. 69 (1985); and Adrienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions, Part III: The Adopted Child*, 2 Child & Adolescent Soc. Work J. 139 (1985).

[A]t the heart of the clinical defense of confidentiality is the practical and emotional mandate of separation. More simply, healthy birthmothers are expected to separate from their children forever and to have no future knowledge of their whereabouts, to grieve this loss, and essentially to forget, disconnect from this troublesome episode in their lives. Healthy adoptive parents are expected to resolve their infertility prior to adoption and proceed with their lives, unencumbered with future thoughts or feelings for the children they were unable to conceive or for the other set of human beings who gave birth to the child they now raise—as if significant differences between adoptive and biological family relationships do not exist. The psychologically healthy child who has been separated from his or her birth family is expected to grow from infancy to adulthood and ultimately die, untroubled by the lack of access to his or her genetic or cultural heritage, a legal and constitutional privilege denied to no other human being in our society.

The birth mother who spends years and possibly a lifetime longing for reassurance about, or contact with her child; adopted children who grow up longing for information, explanation, or contact, afraid of alienating adoptive parents if they voice their desires; and the adoptive parents, were they to collude either with the birth mother or child in facilitating any connection, particularly early in the child's life: all are regarded as exhibiting a similar pathology. That is, they have been unsuccessful in resolving their grief over their lost relationships and, consequently, have been unable to disconnect, separate, and differentiate as mature, autonomous, adult human beings.<sup>181</sup>

The emergence of a new theory, emphasizing the importance of maintaining relationships with others—the self-in-relation theory—creates a new perspective for assessing the central task of achieving maturity and conversely, for labeling the pathological. This theory no longer posits separation as the central task. Instead, a much more complicated notion of self-identity is postulated which acknowledges that identity itself is continually shaped and reconfigured due to the influence of significant relationships.<sup>182</sup> A relationship requires the achievement of an

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181. Silverstein & Demick, *supra* note 179, at 114 (citation omitted).

182. For this new theory, Silverstein and Demick credit Carol Gilligan, In A Different Voice: Psychological Theory and Women's Development (1982) and Jean B. Miller, Toward A New Psychology of Women (1976) and 22 Stone Center Works in Progress 1-23 (1986):

What Gilligan and Miller articulated was the validity and complexity of the sophisticated task of maintaining a sense of oneself in the midst of being aware of and responsible to the needs and realities of others. Miller and her colleagues have defined and validated, as essential human characteristics, the innate need to participate in reciprocal emotional relationships with other human beings, and the innate potential to enhance the quality of these relationships and of life itself by accentuating one's empathic awareness of the other.

Silverstein & Demick, *supra* note 179, at 114.

individual identity and yet a willingness to cede some independence for intimacy and interdependence.<sup>183</sup>

In the adoption context, this theory becomes more comprehensible due to the "shared fate" conceptualization of Kirk.<sup>184</sup> The genetic and social contribution of both sets of parents shape the adopted child's identity. It is not pathogenic but normal and imperative for the child to acquire information about his biological family, just as in daily interactions, he or she acquires information about the members of the adoptive family. The child's search for "Who am I?" is an amalgam of both the genetic and social contributions to identity formation. Furthermore, as Kirk observed, as the child's caretakers, the adopting parents are responsible for assisting their child in developing empathy for the pressures that caused the biological parents to relinquish him to them. For that formidable task, the adoptive parents must themselves develop empathy for the biological parents. Through this theoretical lens, acknowledgement of the immutable interrelatedness of the child and his biological family and thus, of the interrelatedness of adopting family and the child's biological family, can be viewed as the principal developmental task of the adopted child and the adopting family.

Aside from changing theories of adjustment to adoption, the question is fairly asked whether we know enough to make sensible public policy choices about the wisdom of permitting cooperative adoptions and enforcing post-adoption contact agreements. For each of the members of the "adoption triad," the biological parents, the adopting parents, and the child, we will first present the theoretical and the empirical research on the traditional closed or confidential model of adoption. We will then discuss similar research of more open models.

Though there is a substantial body of research on the traditional, closed model, research on the cooperative adoption model is relatively scarce. There are now two large scale empirical studies. Professor Grotevant and his colleagues have collected interview data from biological parents, adoptive parents, and the children in 190 adoptions. At the time the sample was drawn, the ages of the adopted children ranged from four to twelve years. Because their work is based on a representative sample of adopting parents recruited from fifteen states, it will be hereinafter referred to as the "National Study."<sup>185</sup> Professor Berry and her colleagues have compiled a larger data base, a questionnaire return sample of 1,396 adoptive placements made in California. Their work has focused on the reactions of adopting parents and indirectly, the reactions of adopted children. This study

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183. Theodore Lidz, *The Person: His and Her Development Throughout the Life Cycle* (1976).

184. See *supra* the discussion of Kirk's book, *Shared Fate*, in the text accompanying notes 114-116.

185. Three published reports are based on this data set. The first study collects data from the adoptive parents who were interviewed during the period 1987-1992. Harold D. Grotevant et al., *Adoptive Family System Dynamics: Variations by Level of Openness in the Adoption*, 33 *Fam. Process* 125 (1994). A second study reports data derived from the interviews of 171 of the adopted children. Gretchen M. Wrobel et al., *Child Participation in Openness*, 67 *Child Development* 2358 (1996). The views of 169 biological mothers in the database who were interviewed about openness options have been reported in Ruth G. McRoy et al., *Changing Practices in Adoption* (1994).

will be hereinafter referred to as the "California Study."<sup>186</sup> Both the National Study and the California Study are on-going, longitudinal studies which ultimately should provide us with a great deal more knowledge about the impact of post-adoption contact arrangements.

Since post-adoption contact agreements did not begin until the 1970s, currently there simply are no longitudinal studies following the biological parents, the child and the adoptive parents through the child's transition into adulthood. There are also methodological difficulties in the scientific study of openness in adoption.<sup>187</sup> Furthermore, any study comparing the attitudes and experiences of families in open adoptions with those in closed adoptions would need samples drawn from each model. Because of the rich variety of post-adoption contact agreements, many adoptions continue to be more or less closed or "confidential."<sup>188</sup> By definition, when the biological and adopting parents have consciously chosen the closed model, they may be unwilling to participate in research that at least to some degree compromises their privacy. As a result, the empirical research that does offer

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186. The sample was drawn from adoptions completed in California during the one year period, July 1988-June 1989. Based on questionnaires returned by the adopting parents in the sample, three articles have so far been published which address the impact of openness on adopting parents: Berry (1991), *supra* note 7; Marianne Berry, *Adoptive Parents' Perceptions of, and Comfort with, Open Adoption*, 72 *Child Welfare* 231 (1993); and Marianne Berry et al., *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families* (forthcoming 2000) (on file with authors) [hereinafter Berry (2000)].

A fourth publication spawned by this same California sample compares the preparation for adoption provided for adoptive parents in independent, agency and public adoptions and assesses the parents' levels of satisfaction with the resulting adoption. Berry (1996), *supra* note 1. While preparation for adoption is an important aspect of satisfaction with any adoption, confidential or cooperative, the findings of this article are off-point for this discussion. We will address that issue in Part VI of this article.

187. Some of the empirical studies involve the use of questionnaires and or cross-sectional samples which can produce findings of restricted validity. The limitations of a questionnaire survey are obvious. The scientist has only the written responses and lacks any knowledge of the context in which they were given, including information about whether they are the product of private, independent thought or carefully considered. A survey conducted by individual interview provides not only the context but also an opportunity to resolve any misunderstanding, to clarify or probe a particular response. A cross-sectional sample is one that takes a group of individuals at a given point and examines the group profile in terms of variables. If it thereafter follows the subjects, it can only compare the group's characteristics as a group at the initial point and at the later point. A cross-sectional study cannot produce valid conclusions about individual development.

188. Grotevant and his colleagues have identified six types of adoptions along a continuum of openness: (1) Confidential adoptions: minimal information is exchanged and the exchange typically ends at the adoption decree; (2) Time-limited mediated adoptions: nonidentifying information is exchanged through an intermediary, typically adoption agency personnel; (3) Ongoing mediated adoptions: nonidentifying information is exchanged through an intermediary on a continuing basis, even after adoption; (4) Time-limited fully disclosed adoptions: direct communication and full disclosure of identifying information occurs for only a limited period; and (5) Ongoing fully disclosed adoptions: direct communication and full disclosure continues for the indefinite future. Grotevant et al., *supra* note 185. Demick & Wapner use differing labels but similar distinguishing variables. Jack Demick & Seymour Wapner, *Open and Closed Adoption: A Developmental Conceptualization*, 27 *Fam. Process* 229 (1988).

comparative data about pairs of parents in open *vis-à-vis* closed adoption arrangements often involves small samples.<sup>189</sup>

Despite those limitations, we are beginning to accumulate some interesting data that focuses on the variable of the degree of openness in adoption and its impact on both the biological parents and adoptive parents, and to a lesser degree, on the child. Because most legislative and judicial concern centers on the perceived deleterious effect of cooperative adoption on the adopting parents, we begin with a review of that literature.

#### A. *Adaptation by the Adopting Parents*

Theorists have hypothesized that confidentiality in adoptions is essential to the assumption of a full, secure parenting role by the adoptive parents.<sup>190</sup> Although there are surprisingly few studies of the adopting mother-infant bonding process,<sup>191</sup> scholars inferred that interferences by biological family members might disrupt the new parent's attachment to their child and found anecdotal support for this concern:

[O]ne mature adoptive mother, after receipt of a letter from the birth mother, felt a constraint in her previously wholehearted and joyful involvement with her infant. She felt "someone is always looking over my shoulder. There's a glass wall between me and the baby."<sup>192</sup>

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189. Harriet E. Gross, *Open Adoption: A Research Based Literature Review and New Data*, 72 Child Welfare 269 (1993), presents the findings from two Illinois studies. The first study involved in-depth interviews with 32 adoptive parents and 15 of the associated biological parents in private agency placements made between Fall 1989 and Fall of 1991. The second study reported questionnaire response data from 75 adoptive families who had earlier (1985-1990) adopted children from the same agency before it began recommending greater openness to its clients. An Oregon study of the use of mediation as a process for creating cooperative adoptions is the subject of Jeanne Etter, *Levels of Cooperation and Satisfaction in 56 Open Adoptions*, 72 Child Welfare 257 (1993). The sample is drawn from adoptive parents who entered into such arrangements in adoptions through a private adoption agency in the period 1984 to mid-1987. Their levels of cooperation were not compared with closed or confidential adoption parents. An even smaller sample involving interviews with both biological and adoptive parents in seventeen adoptions ranging from confidential to fully disclosed is described in Ruth G. McRoy & Harold D. Grotevant, *Open Adoptions: Practice and Policy Issues*, 6 J. of Soc. Work & Human Sexuality 119 (1988). Belbas studied twelve families who experienced differing degrees of openness. Nancy F. Belbas, *Staying in Touch: Empathy in Open Adoptions*, 57 Smith C. Stud. in Soc. Work 184 (1987). Finally, data from 59 biological mothers were reported in Terril L. Blanton and Jeanne Deschner, *Biological Mothers' Grief: The Postadoption Experience in Open Versus Confidential Adoptions*, 69 Child Welfare 525 (1990).

For a general survey of both theoretical and empirical literature as of 1993, see Marianne Berry, *Risk and Benefits of Open Adoption*, The Future of Children, Spring 1993, at 125 [hereinafter Berry (1993)].

190. In an unpublished study, Smith found that prospective adoptive parents who had elected confidential adoptions did so because they feared that they could not otherwise act as full parents. J. Smith, *Attitudes of Prospective Adoptive Parents Towards Agency Adoption Practices, Particularly Open Adoption*. Paper presented at the meeting of the National Committee for Adoption, Washington, D.C. (Apr. 1991), quoted in Grotevant et al., *supra* note 185, at 127.

191. Kraft et al., *supra* note 180, at 71.

192. *Id.* at 78.



In addition to the negative impact of post-adoption contact on bonding within the adopting family, two other therapeutic concerns emerge from the clinical literature: that adopting parents' sense of the inviolability and permanence of their relationship with the child will be jeopardized and that they will rue openness and will feel more dissatisfied than adopting parents who can arrange confidential adoptions. Using the largest, most representative sample of adoptive parents, the National Study studied each of these potential problems. A range of adoptions was represented, from completely confidential to ongoing, fully disclosed arrangements with some personal contact.

The most compelling concern about cooperative adoptions is their potential for undermining the parental bonds between the adopting parents and the child. The National Study examined the strength of parent-child bonding across the continuum of openness. Using a cluster of variables testing acceptance of the special role of adopting parents, they found that the adoptive parents in ongoing, fully disclosed adoptions rated significantly higher on each subtest of adjustment than adoptions with less contact with biological family members. The adopting parents in fully disclosed adoptions demonstrated greater communication with the child about the adoption, greater empathy for the child's interests in and needs for connection to his biological heritage, greater empathy for the biological parents, and overall, greater understanding of their unique role as parents by adoption and the distinct satisfactions and problems of that status.<sup>193</sup>

The National Study also found little to support the second concern that adoptive parents in cooperative adoptions would be more fearful and less secure in their parenting relationship. Obviously the ability of the adopting parents to negotiate and agree to the details of post-adoption interaction creates some sense of their power and control as parents. But the real issue is whether with a negotiated contract, their parental security is compromised. Specifically concerning the touted fear of the biological parents' reclaiming the child, Grotevant found the *lowest* degrees of fear in ongoing, fully disclosed adoptions.<sup>194</sup> In their consideration of why this result occurred, they theorize that without personal experience, adopting parents are left with only vague, generalized fears based upon stereotypes of overreaching biological parents.<sup>195</sup> Perhaps in confidential

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193. Following Kirk's theoretical work, they found that greater openness appears to reduce harmful "maladaptive beliefs" common among adoptive parents, such as, denying that an adoption family must confront and resolve special issues in addition to the usual complement of problems facing any family or blaming any difficulties posed by the child on his or her genealogy or genetics rather than accepting responsibility for parenting. Kirk, *supra* note 114. See Joan F. DiGiulio, *Assuming the Adoptive Parent Role*, 68 Soc. Casework 561 (1987).

194. 77.2% of adoptive mothers and 82.5% of adopting fathers in fully disclosed adoptions indicated "no fear" of reclaiming. McRoy et al, *supra* note 185, at 16.

195. The media have occasionally hyped biological parents as neurotic creatures who stalk adopting parents with an unrelenting obsession to reclaim their child. See, e.g., *High Incident: Welcome to America* (ABC television broadcast, Sept. 26, 1996). In the case of Little Orphan Annie, of course, it was the villainous Miss Hannigan who created imposter biological parents bent on reclaiming their beloved child.

adoptions, the adopting parents are also haunted by the "maybes." For adopting parents in cooperative adoptions, the reasons most often coded for the *lack* of fear of reclaiming were generated by their actual experience, impressions, and statements of reassurance of the biological parents. Indeed, although all adopting parents, across all types of adoptions were equally secure in their role as "full" parent, those in completely disclosed adoptions manifested the highest perception of permanence.<sup>196</sup>

Similarly, in contrast to the hypothesis that adopting parents would become dissatisfied with any more open arrangements, the National Study found high levels of adopting parents' satisfaction with their particular power and control across all types of adoption. However, Grotevant and his colleagues caution that the important variable may be the power of the parent to agree to and initially fix the level of openness, including the right to remain unreachable as in a confidential adoption. The adoptive parent has the power to control the degree of openness through declining to adopt except using a closed or confidential model. Some authors like Professor Berry suggest that this power is illusory because the market dynamics are such that adoptive parents perceive that they have no choice but to accede to demands for contact if they want to adopt a child.<sup>197</sup> As Grotevant and his colleagues respond to this hypothesis:

The measure applied in this study would have captured dissatisfaction had people felt forced into a type of adoption, if that was in fact what had happened. Our findings suggest that it did not, in fact happen, OR that if it did, it ultimately became acceptable and satisfactory for these families. The adopting parents in this study are satisfied; so satisfied, in fact, that any dissatisfaction tends to focus around their desire for more, not less, contact with the birthparents.<sup>198</sup>

The California Study found similar levels of satisfaction. Like the National Study, the California Study included independent, private, and public adoptions, with varying degrees of openness. Unlike the National Study, nonconsensual contact arrangements, usually urged by public agencies with older children, as well as consensual arrangements for post-adoption contact were represented in the

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196. Grotevant et al., *supra* 185, at 140-41.

197. Marianne Berry, *The Effects of Open Adoption on Biological and Adoptive Parents and the Children: The Arguments and the Evidence*, 70 Child Welfare 637 (1991) [hereinafter Berry (1991 II)].

198. Grotevant et al., *supra* note 185, at 142. Interestingly, dissatisfaction, when it was expressed, concerned a desire for more rather than less contact with the biological family. Thirty adopting mothers (15.9%) and 25 adopting fathers (13.2%) wanted more contact across all levels of adoptions. Only two fathers, both of whom were in intermediary-controlled contact adoptions, wanted less contact. *Id.* at 138.

sample.<sup>199</sup> In the first survey of the adoptive parents one year after placement, differences in satisfaction or comfort levels emerged between the two groups:

Adoptive parents in open adoptions [arranged through independent or private agency placements], for the most part, are cautiously comfortable with postplacement contact, and the expectation or plan for that contact seems to be a critical factor. . . . [P]lanning for contact was the best predictor of comfort.<sup>200</sup>

Even among public agency adoptions and adoptions of children with a history of mistreatment—groups with otherwise low levels of comfort with contact—those who met the biological parent prior to placement reported significantly higher levels of comfort with postplacement contact.<sup>201</sup>

Three years later, the adoptive parents were resurveyed. Adoptive parents still expressed high levels of comfort: Nearly three out of every four (73%) reported feeling either “very comfortable” or “comfortable” with openness.<sup>202</sup> Overall, 92% of the adoptive families reported satisfaction about the adoption experience.<sup>203</sup> Other studies report similar levels of satisfaction.<sup>204</sup>

#### *B. Adaptation by the Adopted Child*

By all measures, empirical studies of adopted children in confidential adoptions indicate that these children experience unique adjustment problems centered on their hybrid status. Although most adopted children individually are within the normal range of functions, as a group they are more vulnerable to behavioral and educational problems than are children living in intact homes with their biological families.<sup>205</sup> There is a developmental trend revealing changing concerns as the child matures. In a study of 85 six- to seventeen-year-old adoptees

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199. “Adopters who used public agencies were much more likely than other adopters to say that the agency or court made the ultimate decision [about contact].” Berry (1993), *supra* note 189, at 240-41. In addition, Professor Berry notes that foster parent adopters were also more uncomfortable about openness, to have a negative impression of the biological parents, and to state that contact would have a negative influence on the child. *Id.* at 241.

200. After planning, in rank order, the other key predictors of comfort were: the child’s absence of a history of mistreatment, the biological mother’s level of education, the directness of contact, the adoptive mother’s older age, and face to face contact between the adopting parents and the biological parents before placement. Berry (1993), *supra* note 189, at 249.

201. *Id.* at 252.

202. Berry (2000), *supra* note 186, at 11. In this reported research, those who had adopted foster children were excluded, leaving a sample size of 764 children.

203. *Id.* at 13.

204. In Professor Gross’s in-depth interview study of 32 adoptive parents and 15 of the associated biological parents, overall, 84% were “mainly satisfied.” Only two families have had difficult relationships with the biological parents and had discontinued the relationship for the present. The biological mother had left the country in one case and in the other case, contact was discontinued because neither set of parents has pursued it. Gross, *supra* note 189, at 276-77.

205. Brodzinsky, *supra* note 14. Cf. K.S. Marquis & R.A. Detweiler, *Does Adopted Mean Different? An Attributional Analysis*, 48 J. of Personality & Soc. Psych. 1054 (1985).

who were placed as infants with middle class families, the younger elementary school aged children viewed their adoptive status positively, although they acknowledged intrusive or unbidden thinking about their birth family. In contrast, older children and adolescents are more likely to view their adoption with ambivalence. As Smith and Brodzinsky explained:

These [age difference] results are understandable in the context of earlier findings dealing with developmental changes in children's beliefs about, and understanding of, adoption. Previous research suggests that young children have a limited ability to understand the realities of their family status. Because of their cognitive immaturity, they often view adoption in unrealistically positive ways. As they mature cognitively, though, they become more aware of the implications of being adopted, including the loss of biological family members, cultural and ethnic ties, and even the loss of part of themselves. As a result, a sense of ambivalence about being adopted begins to emerge for many children, and continues to grow into adolescence.<sup>206</sup>

Although identifying the precise cause(s) of adjustment difficulty has eluded researchers,<sup>207</sup> both individual and adoptive family dysfunctions have been linked to lack of information about the adopted child's ancestry.<sup>208</sup> In adolescence, adopted children reportedly suffer greater emotional disturbance and identity crises than do other adolescents who possess the "biological reference points"<sup>209</sup> needed to formulate and accept a sense of identity.<sup>210</sup> Lacking that compass, these adolescents experience confusion and can veer between villainizing or lionizing their biological family. For some adopted children, the "maybes" can become all-consuming. As Professor Wrobel and her colleagues have reported:

Children with less information about birthparents tend to wonder about the birthparents' health and well-being and are most curious about what their birthparents look like. One child when asked what he would like to ask his birthparents stated, "I'd like to ask their names. 'Cause I don't really know their names. I want to know what they look like. I can't think of anything else." Children with more information about birthparents tend to be curious about what the birth mother has been doing since they last had contact with her, when they will get to see her again,

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206. Daniel W. Smith & David M. Brodzinsky, *Stress and Coping in Adopted Children: A Developmental Study*, 23 J. of Clinical Psych. 91, 96 (1994) (internal citations omitted).

207. Brodzinsky, *supra* note 14, at 153.

208. J.P. Triseliotis, *In Search of Origins* (1973); Kenneth Kaye & Sarah Warren, *Discourse about Adoption in Adoptive Families*, 4 J. of Fam. Psych. 406 (1988).

209. L.C. Berman & R.K. Bufferd, *Family Treatment to Address Loss in Adoptive Families*, 1 J. of Fam. Psych. 406 (1986).

210. P.M. Brinich & E.B. Brinich, *Adoption and Adaptation*, 170 J. of Nervous & Mental Disease 489 (1982); L.R. Dickson, W.M. Heffron & C. Parker, *Children from Disrupted and Adoptive Homes in an Inpatient Unit*, 60 American J. of Orthopsychiatry 594 (1990); Ruth G. McRoy et al., *Adoption Revelation and Communication Issues: Implications for Practice*, 71 Families in Soc'y 550 (1990).

or meet her if they have not done so, and information about birth siblings. One child stated that "Sometimes I wanted to meet her myself and then Mom set up this rule, not until I'm 18. And I really wanted to meet her, 'cause you know my Dad said I could and talked it over with my birthmother and she would be glad if I met her." Another child who felt his birth mother "probably has a baby of her own," wanted to know "if she [birth mother] has a baby."<sup>211</sup>

As Professor Berry has pointed out, the fact that there are adjustment problems experienced by adopted children in traditional, closed adoptions does not necessarily mean that preempting the need to know about one's heritage by earlier openness will prevent psychological maladjustment.<sup>212</sup> Indeed, greater openness may perhaps create different and new kinds of problems. However, adoption specialists believe that the traditional secrecy of the process ignores the child's inevitable curiosity about his or her roots and implies that the facts of heritage are shameful and need to be hidden. They hypothesize that openness should heighten the prospects for the development of healthy self-esteem. In other words, greater openness should ease the adopted child's adaptation to his status. Increased information should provide a reality check for the process of identity formation minimizing confusion and anxiety about "who I am."<sup>213</sup>

Finally, theorists maintain that post-decree communication between the birth parents and the child provides the child with an extended family group of supportive adults.<sup>214</sup> They urge that post-adoption relationships between the adoptive and biological families pose greater promise for positive interactions because the families, though similar to post-divorce custody and visitation arrangements, lack the emotional baggage typically accompanying marriage dissolution and family reconstitution. Privately arranged agreements for post-adoption communication may diminish rivalry for the child's affection that can occur when contact is postponed until the child becomes an adult and may contribute to the harmony of future cooperation and emotional support of the child.

Three empirical studies have examined the impact of greater openness on children who were adopted as infants: an unpublished New Zealand report,<sup>215</sup> the

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211. Wrobel et al., *supra* note 185, at 2371.

212. Berry (1991 II), *supra* note 197, at 639.

213. Berry (1993), *supra* note 189, at 127.

214. Fady Hajal & Elinor B. Rosenberg, *The Family Life Cycle in Adoptive Families*, 61 *Am. J. of Orthopsychiatry* 78 (1991); S.A. Bradbury & M. R. Marsh, *Linking Families in Preadoption Counseling: A Family Systems Model*, 67 *Child Welfare* 327 (1988).

215. M. Iwanek, "A Study of Open Adoption Placement," 14 Emerson Street, Petone, New Zealand (1987). In her overview of the literature, Professor Gross reports that Iwanek's study, based on interviews with the adopting parents, found open discussions between the adopting children and their parents about biological family members and reported that the children "seemed at ease talking about them." The children's response to the potential of future contact ranged from "enthusiastic" to "intermittent interest", with the opportunity to meet siblings "highly valued." Gross, *supra* note 189, at 274.

We are inclined to agree with Professor Gross that published studies of the effects of openness on children who were adopted when older and with preexisting bonds with their biological families present

California Study,<sup>216</sup> and the National Study.<sup>217</sup> The California Study, by far the most massive, reports data from questionnaires returned by adopting parents, representing 1,268 families with children who were adopted over a range of ages, from infancy to sixteen year olds. Based on a standardized behavior inventory, Professor Berry found that as rated by their adoptive parents, children with post-placement contact with members of their biological families had significantly better behavior scores than children in adoptions with no access to birth parents.<sup>218</sup> However, a follow-up survey conducted two years later found no significant differences according to the degree of openness in reported behavioral problems of the children, now in their adoptive placements for over four years.<sup>219</sup> As Berry summarized the study's findings: "The child's interpretation of any contact or relationship with biological parents in an open adoption is at the center of the debate over the benefits of continued access, and it is precisely this interpretation that is yet to be illuminated by research."<sup>220</sup>

Part of the National Study has involved interviews and self-assessments made by 171 children who were adopted as infants and at the time of the interviews, ranged in age from four to twelve years. Comparison groups were set up across all types of continuing contact, from fully confidential to fully open arrangements. The researchers focussed on assessing the child's satisfaction, curiosity about birth parents, overall feelings of self-worth and understanding of adoption. An interesting interaction was found between satisfaction with the arrangements, whatever they were, and continuing curiosity about the birth family. Across all types of post-adoption contact, older children were more curious and generally less satisfied than younger children. However, only the older children in fully disclosed adoptions remained curious but on balance, were still "satisfied" with their access agreements. Using standardized tests assessing perceptions of self-worth or self-esteem, all children reported having positive images of themselves. Thus, the theoretical projections of harm to the child were not validated. Finally, this study found that being provided with more information about the child's own adoption and birth family enhances the child's level of understanding of adoption and his or her unique status as an adopted child.<sup>221</sup>

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quite distinguishable dynamics. *Id.* at 271-72. For a discussion of those studies, see Berry, *supra* note 189.

216. Berry (1991 II), *supra* note 197.

217. Wrobel et al., *supra* note 185.

218. Berry (1991 II), *supra* note 197.

219. Berry (1996), *supra* note 1. Interestingly, this survey did find that the adopting parents' perceptions of their children's behavioral problems were higher than the norms on the Behavior Problem Inventory, a standardized assessment test. More than one-quarter of the adopted children had scores higher than norms.

220. Berry (1993), *supra* note 189, at 133.

221. Wrobel et al, *supra* note 185. An extremely interesting finding of the study was that a discrepancy existed between the degree of openness avowed by the adopting parents and that acknowledged by the child. The children in this study were interviewed privately. Some information received from biological parents in "mediated" or semi-open adoptions was not always shared with the children. As a result, these researchers chose to use the children's characterization of arrangements rather than the adults. Although no definitive conclusions can be drawn from the withholding of

Evaluating the impact of post-adoption contact on children is extremely complex; however, at a minimum the theoretical fears that children would be more anxious, confused and compromised by increased information and or contact have been disproved.

### C. Adaptation by the Birth Parents

The birth parents are thought to be the most obvious beneficiaries of post-adoption contact agreements. Indeed, in an adoption market of scarcity, their superior bargaining power is believed to be the impetus behind the open adoption trend.<sup>222</sup> Now possessing socially sanctioned alternatives to adoption such as single parenthood, foster care and abortion, the number of biological parents who ultimately opt for adoptive surrender of their child has been steadily diminishing over the past twenty years.<sup>223</sup> Researchers have found that the availability of the option to have continuing contact influenced some biological mothers to choose adoption.<sup>224</sup>

Kraft and her colleagues emphasized that the typical birth mother who surrenders a child for adoption is herself a child, an adolescent with her own developmental process yet to be completed. As they warn, "Most adolescents are not cognitively capable of assessing the consequences of a decision of whether or not to maintain contact with the child. . . . A confidential adoption, while no less momentous, is less complex a choice."<sup>225</sup> There is consensus in the clinical community that all biological parents experience grief similar to the death of the child when they surrender a child for adoption.<sup>226</sup> Some clinicians go further,

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information, they conjecture that "[A]s children discover that they have been excluded from information provided by their birthmothers, their satisfaction with the current level of openness that contains exclusion of available information may be negatively affected." *Id.* at 2371.

222. Biological parents "enjoy considerable power and choice in the determination of the degree and extent of contact they will have with their relinquished child, and stand to gain the most from that contact. It is this lack of control on the part of adoptive parents, however, that is associated with adoptive parents' negative experiences with openness." Berry (1991 II), *supra* note 197, at 648.

223. C.A. Bachrach, *Adoption Plans, Adopted Children, and Adoptive Mothers*, 48 J. of Marriage and the Fam. 243 (1986).

224. R.P. Barth, *Adolescent Mothers' Beliefs About Open Adoption*, 68 Soc. Casework 323 (1987). In contrast, however, McRoy and his colleagues found in their larger study of 169 birth mothers that most did not seek adoption because of the availability of an openness option and in fact, did not know about such alternatives until made aware by the adoption agency. McRoy et al., *supra* note 14. These apparently conflicting results can be harmonized by appreciating that some biological parents will choose adoption regardless of the openness option. The target sample should be mothers who chose to forego adoption. In the research of Kallen and his colleagues who interviewed 105 pairs of adolescents and their mothers, the major barrier to the adoption choice was the lack of continuing information about the fate of a child who is surrendered for adoption. David J. Kallen et al., *Adolescent Mothers and Their Mothers View Adoption*, 39 Fam. Relations 311 (1990).

225. Kraft et al., *supra* note 180, at 18.

226. Seven stages of the grieving process have been postulated: denial, anger, guilt, depression, preoccupation with the lost person, bargaining and acceptance. Pam Lamperelli & Jane Smith, *The Grieving Process of Adoption: An Application of Principles and Techniques*, J. Prof. Nursing & Mental Health Servs. 24 (Oct. 1979).

theorizing that mourning is circumvented and may remain unresolved if continued contact can be anticipated. Thus, two separate concerns emerge from this literature: that biological parents will remain trapped in grief to their psychological detriment or that they will still consider the child "theirs" and may inappropriately interfere in the lives of the adopting family or even challenge the adopting parents' primacy as the child's parents.

Only one empirical study has validated the concern that biological mothers in cooperative adoptions experience relatively higher levels of grieving. In a mail questionnaire survey of 59 birth mothers, Blanton and Deschner found that the eighteen who were in cooperative adoptions were significantly more dependent and saddened than the birth mothers in confidential adoptions.<sup>227</sup> However, using a larger sample McRoy and his colleagues found that over time, birth mothers in direct contact with adoptive families were *less* likely to express regret about the placement decision than mothers in confidential or less open arrangements.<sup>228</sup> These findings are compatible with the views of some clinicians that despite prolonged grieving, biological parents can still on balance, view cooperative adoptions favorably. Some adoption counselors believe that openness assuages the grief of biological parents who surrender the child for adoption and need not necessarily impede their adaptation to the reality of loss.<sup>229</sup> More control over the post-adoption arrangements may mitigate fear of the unknown, or misgivings about how the child will fare in the adoptive home.<sup>230</sup> Two additional studies have found that the overwhelming majority of birth mothers expressed satisfaction or high satisfaction with more open arrangements.<sup>231</sup>

The second related and often expressed concern is that regardless of the mutuality of the initial agreement, the adoptive parents will eventually lose control over the arrangements due to the biological parents' increasing insistence on more

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227. Blanton and Deschner, *supra* note 189.

228. McRoy et al., *supra* note 14.

229. Kenneth W. Watson, *Birth Families: Living with the Adoption Decision*, 44 Pub. Welfare 5 (1986); Cathy Chapman et al., *Meeting the Needs of the Adoption Triangle Through Open Adoption: The Birthmother*, 4 Child & Adolescent Soc. Work 203 (1986).

230. Baran et al., *supra* note 123. In comparisons between groups of teenage mothers who surrendered their children for adoption and those who declined adoption, Kallen and his colleagues found that the overriding concern of the surrendering mothers was the need to have continuing information about the child. Kallen et al., *supra* note 224, at 315.

231. Gross, *supra* note 189; Etter, *supra* note 189. Professor Gross's research is based on in-depth interviews with 32 adoptive parents and 15 of the associated biological parents in placements made between the Fall of 1989 and Fall of 1991. Of the biological mothers, only one was dissatisfied and contact has been discontinued. All the others were satisfied and felt positive about the relationship they have developed with the adoptive families. Gross, *supra* note 189, at 276-77. Etter used a questionnaire to study the use of mediation to arrange cooperative adoption. She surveyed 56 adoptions four and one-half years after placement. In 32 of these adoptions, both a biological parent and an adoptive parent responded. She found that 94% of the biological parents reported being "satisfied" with the level of openness. (Their other choices were "neutral" (3%) or "dissatisfied" (3%). Etter, *supra* note 189, at 262-63. Neither the Gross nor the Etter study had a companion group of biological parents in a confidential adoption; therefore, comparisons in satisfaction cannot be assessed. The study by McRoy et al., *supra* note 14, found that birth mothers were satisfied across all types of post-adoption contact arrangements.



frequent and intense forms of contact. A Canadian study of attitudes toward disclosure of information and potential reunion between an adopted child and his birth family found that birth mothers exhibited acceptance of their decision to surrender their children and expressed great deference to the adopting family:

Significantly, birth mothers agreed that they generally would not make the initial contact [with their adult child] but disagreed on perception of the reasons. Contrary to what adoptees thought, birth mothers stressed that they did not forget the child they relinquished, but they were fettered by the belief that they had renounced all their rights to the child because his real parents were the people who adopted and raised him. Furthermore, they were afraid their initiative might upset the adopted child or disrupt his life [or cause trouble in the adoptive family].<sup>232</sup>

This self-restraint was confirmed in the California Study of adoptions four years after placement. Professor Berry found that contact had in fact diminished despite initial expectations of the adopting parents. Contact increased in only 4% of these adoptions. In 49% of the adoptions with changes in contact, the adopting parents reported that the birth parents requested the change and that 39% were by mutual agreement. For those parents still in contact, contact was not frequent: on the average, they had three mail contacts, three phone contacts, and one in-person contact with the birth parent over the previous two years.<sup>233</sup> The National Study produced similar widely varied arrangements and no evidence of overreaching demands by the biological parents.<sup>234</sup>

These findings are a far cry from bald assumptions that biological parents are like burglars, who cannot be entrusted with any information that may lead to contact with their surrendered children. All available evidence points to the conclusion that biological parents appear to adjust to the loss of their parenting role and are unlikely to overreach and attempt to disrupt the developed relationship between the child and the adopting family.

In sum, despite misgivings among professionals and initial uncertainty acknowledged by the pioneer adopting parents, cooperative adoptions appear to be working—to be “satisfying”—to those who chose that option. Although given the

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232. Sachdev, *supra* note 104, at 72.

233. Berry (2000), *supra* note 186, at 10.

234. As Grotevant and his colleagues note:

The frequency and intensity of contact in the fully disclosed families ranged quite widely. The frequency of visits was heavily influenced by geographical distance. When the adoptive family lived far from the birthmother, visits may be once a year or less, although letters and phone calls may be exchanged more frequently. In general, most families did not have visits with the birthmother more than a few times a year. The exchange of phone calls, letters, and holiday and birthday gifts was more typical. In some cases, contact with the birth mother was infrequent, but there was more contact with other members of her extended family. The wide variation in both frequency and intensity of contact within the fully disclosed sample is indicative of the informal and ongoing negotiation process that occurs in each individual family's situation.

Grotevant et al., *supra* note 185, at 129-30.

uniqueness of the negotiating parties' needs and personalities it is impossible to attribute openness as a cause of adopting parents' security, at a minimum these studies disprove the theoretical converse: that a degree of openness leads to heightened fears of retrieval or a perception of the impermanence of the parent-child relationship.

Compared to the adults, we know much less about the long-range implications of increased openness for adopted children. The California Study has documented the lives of the adopting families for only four years after the decree; the oldest adopted child in the National Study report was nearly thirteen.<sup>235</sup> It will take another generation before we can truly assess the impact of openness on these children as they pass through adolescence and themselves become adults and parents. Nevertheless, adopted children in cooperative adoptions seem to be faring well, and there is no data that suggest that when their parents elect such arrangements that the children's best interests are disserved.

However, the limits of our scientific knowledge now and in the foreseeable future certainly caution against court-imposed contact over the objection of one or both parties. At best, the preliminary data can support only a recognition of voluntary and knowing agreements, thoughtfully and carefully initiated by the biological and adopting parents. Both the National Study and the California Study emphasize the importance of mutuality in reaching any agreement about post-adoption contact or remaining in a confidential adoption. However, even recognizing the performability of the agreements requires a leap of faith that the young children's best interests are nearly always best discerned and protected by those who love and care for them rather than by psychologists, lawyers, legislatures or courts.

In the model statute presented in the next section, we have searched for a process that entrusts decisions about openness to the children's parents, biological and adopting, and ensures to the greatest extent possible that such decisions are fully and carefully explored. The process for arriving at consensual post-adoption contact arrangements also must reinforce the need for flexibility and reevaluation over the course of any relationship between members of the biological and adopting families. Among the most remarkable findings shared by all reported research is the flexibility and accommodation exhibited by both sets of parents in altering arrangements without court intervention.<sup>236</sup>

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235. The oldest child was 12.98 years. Wrobel et al., *supra* note 185, at 2361.

236. In the National Study, Grotevant and his colleagues found that almost two-thirds of the 57 ongoing, fully disclosed adoptions in their sample did not begin that way. Half (51%) began as "mediated" adoptions with all inter-family contacts conducted through an agency intermediary. Perhaps more surprising, 14% began as confidential adoptions with no pre-adoption or proposed contact whatsoever. Grotevant et al., *supra* note 185, at 129. In Etter's study of 56 mediated adoptions, less than 15% reported having the same amount of contact as they had originally written into their agreements. Over half (52.2%) reported having more contact than planned, and 31.1% had less contact. Etter, *supra* note 189, at 261. For results of the California Study, see *supra* text accompanying note 233.

VI. A CAUTIOUS AUTHORIZATION OF CONSENSUAL AGREEMENTS:  
A MODEL STATUTE

As Kraft and her colleagues aptly noted, biological and adopting parents who have desired continuing family contact have had to create an interactional model. There simply are no modern imbedded cultural patterns,<sup>237</sup> although probably a great many nineteenth century informal adoptions involved continued interaction between the child and both of his families. Consequently, writing legislation to guide these families is a bold undertaking. Of the eleven pioneering states that have enacted statutes which explicitly authorize some form of cooperative adoption,<sup>238</sup> only seven of them apply to a nonrelative adoption of an infant.<sup>239</sup> Because the proposed model statute controls infant adoptions,<sup>240</sup> we will primarily focus on those statutes enacted by the legislatures of New Mexico,<sup>241</sup> Oregon,<sup>242</sup> Washington,<sup>243</sup> and Ohio.<sup>244</sup> (The remaining states, Alaska,<sup>245</sup> Montana,<sup>246</sup> and South Dakota<sup>247</sup> have simply broadly authorized post-adoption visitation without elaboration.) As might be anticipated due to such a small and recent legislative sample, collectively, these seven statutes are but a modest beginning point. Though the major issues that have arisen concerning the effect of post-adoption contact

237. Kraft et al., *supra* note 180, at 20.

238. See *supra* note 9.

239. In intra-family adoptions, state statutes typically permit post-adoption visitation between biological relatives of the child other than the biological parents. For example, at least twenty-nine states have statutes that authorize grandparent visitation after adoption, but most of these statutes limit post adoption visitation to stepparent adoptions. See *In re the Adoption of Francisco A.*, 866 P.2d 1175, 1179 (N.M. Ct. App. 1993). Only a handful of these statutes would allow grandparents visitation after adoption by a nonrelative. *Id.* Some of these statutes also extend visitation to the child's siblings or other biological relatives. *Id.*

240. States such as Indiana, Maryland, Nebraska and New York that authorize post-adoption contact agreements for older children who have bonded with their biological relatives could extend existing legislation to include the provisions of our model statute, making modifications when necessary to achieve a harmonious statutory approach to cooperative adoption. See *supra* note 9 for citations and a brief description.

Similarly, our statute explicitly applies only to prospective adoptions. Consequently, predictably there will be some parties to existing adoptions who have informally agreed to post-adoption contact without statutory authorization but who would like to enjoy the protections of these new provisions. We can think of no theoretical reason why even though the adoption has already been completed, they should not be protected, provided both parties can reach agreement about continued contact arrangements. In contrast, parties to finalized confidential adoptions should obtain no new rights as a result of this model statute and instead, should be left to pursue existing adoption registration remedies. See *supra* note 119.

241. N.M. Stat. Ann. § 32A-5-35 (Michie 1996).

242. Or. Rev. Stat. § 109.305(2) (1995).

243. Wash. Rev. Code Ann. § 26.33.295(1) (West Supp. 1995).

244. Ohio Rev. Code Ann. § 3107.60-3107.65 (Baldwin 1996).

245. Alaska Stat. § 25.23.130(c) (Michie 1995). For the text of the Alaska provision, see *supra* text accompanying note 11.

246. Mont. Code Ann. § 40-8-136 (1989), as interpreted by *Groves v. Clark*, 920 P.2d 981 (Mt. 1996).

247. S.D. Codified Laws § 25-6-17 (Michie 1987). See *In re the Matter of J.H.*, 590 N.W.2d 473 (S.D. 1999).

agreements are resolved, many issues that can be reasonably anticipated to flow from authorization remain unresolved.

Though certainly the child's interests are at stake in any custodial arrangement, we do not believe that in an infant adoption, the courts should be authorized to impose post-adoption contact absent the consent of the biological and adopting parents.<sup>248</sup> Of the statutes which explicitly authorize some form of cooperative adoption, all but the Alaska statute are limited to consensual agreements. Thus, while the child's interests are to be served, references to the child's "right" should be avoided.<sup>249</sup> Different considerations emerge for the child who has bonded with his biological family before being adopted by others.<sup>250</sup> In contrast, for children who lack sufficient maturity to articulate their own concerns, the persons who are in the best position to gauge the child's interests are those with natural bonds, the biological parents, and those with inchoate but vibrant concern for the child's well-being, the adopting parents. Both sets of parents have the greatest interest in the child and in future arrangements for the child that can accommodate their personal and family values, needs and aspirations.<sup>251</sup> Consequently, we believe that the only workable post-adoption arrangements are those that are negotiated and consensual. Although court-ordered contact may be justified for older children, we would strongly reject such an authoritarian model for infant adoptions.<sup>252</sup>

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248. The courts of at least three states have assumed the power to order post-adoption visitation: Connecticut: *In re Jennifer P.*, 553 A.2d 196 (Conn. App. Ct. 1989) (holding that a former foster parent had standing to petition for visitation rights with a child in custody of the state agency) and Massachusetts: *In re Adoption of Adam*, 500 N.E.2d 816 (Mass. App. Ct. 1986); *In re Adoption of Abigail*, 499 N.E.2d 1234 (Mass. App. Ct. 1986); *Petition of the Dept. of Soc. Servs. to Dispense with Consent to Adoption*, 467 N.E.2d 861 (Mass. 1984) (approving the inclusion of continued visitation agreements within public agency permanency planning for children whose parental rights have been terminated); and South Dakota, *In re S.A.H.*, 537 N.W.2d 1 (S.D. 1995) (holding that a court may mandate open adoptions in the case of a child in foster home care who had bonded with the biological mother). In contrast, New York has enacted a statute that permits continuing contact only in department adoptions pursuant to N.Y. Social Services Law § 383-c (McKinney 1999) and N.Y. Domestic Relations Law §§ 71-72 (McKinney 1999). See *In re Adoption of Baby Boy D.*, 676 N.Y.S.2d 862 (Erie Cnty Surrogate's Court 1998).

249. One adoption agency chief has suggested that the "right to be recognized belongs to the child rather than to the adults." Pat O'Brien, Director of Downey Side Families for Youth, New York City, quoted in Debra Ratterman Baker, *Legal Analysis: Guidelines for the Appropriate Use of Open Adoption Agreements*, 14 ABA Juv. & Ch. Welfare L. Rptr. 142, 143 (1995). "Rights" suggests entitlements enforceable by the imposition of duties on someone else by some outside law enforcement authority. Wesley Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1923). Ordinarily, recognizing an independent "right" in the child means that some adult must represent the child and urge the child's interests. For additional discussion, see *infra* text accompanying notes 290-291. After *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333 (1989), there would appear to be no federal constitutional right of a child to maintain a filial relationship with a biological parent after adoption.

250. Appell, *supra* note 15.

251. See Leonard Marlow & S. Richard Sauber, *Handbook of Divorce Mediation, especially In Whose Best Interests?* 73-88 (1990).

252. The courts of Nevada and New Mexico have taken this position. See *Morse v. Daly*, 704 P.2d 1087 (Nev. 1985); *In re Adoption of Francisco A.*, 866 P.2d 1175 (N.M. Ct. App. 1993).

Our proposed model statute is based on the overarching principle that the adopted child's best interest can be served by authorizing greater openness in adoption. Interaction between the biological and adopting families reflects the fact that an adopted child maintains a dual familial identity, like dual citizenship, throughout his or her life. Until medical science makes it possible for the complete replacement of genetic material, the law's family-substitution model will remain a fiction.<sup>253</sup> As the social science research demonstrates, the child's adjustment to his or her duality, a genetic heritage and a socialization heritage, is facilitated by appreciation of the contributions of both influences that have shaped the child's individuality.<sup>254</sup>

Our model statute requires that biological parents and adopting parents who are interested in exploring post-adoption contact arrangements must engage in formal mediation.<sup>255</sup> Mediation can be defined as "an informal process in which a neutral third party helps others resolve a dispute or plan a transaction but does not (and ordinarily does not have the power to) impose a solution. . . . The desired result is an agreement suited to the needs of the parties."<sup>256</sup> Although no current statute authorizing post-adoption contact mentions mediation as a means for confecting the initial agreement,<sup>257</sup> the custody literature suggests that mediation is a superior process to adversarial negotiations or court-imposed decrees in drafting custody and visitation agreements. Indeed, most states either expressly authorize or mandate mediation for the resolution of caretaking disputes.<sup>258</sup>

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253. As Sir Henry Sumner Maine observed, "The earliest and most extensively employed of legal fictions was that which permitted family relations to be created artificially, and there is none to which I conceive mankind to be more deeply indebted." *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* 125-26 (1871).

254. Erikson postulated three dimensions to the resolution of identity: psychobiological, psychosocial and psychohistorical. His psychohistorical category splits out from an immediate genetic or biological heritage, one's sense of place in his or her extended and projected genealogical family. See Erik H. Erikson, *Identity: Youth and Crisis* (1968).

255. We should note that mediation is possible even when the biological parents and adopting parents do not presently desire a face-to-face meeting nor contemplate such a future encounter. In the usual custody mediation the parents are in the same room for one or more meetings with the professional mediator. However, many other mediations involve "bilateral negotiation": the mediator moves between the parties who remain apart in separate rooms, though they usually know each other's identities. Charles A. Bethel, *The Use of Separate Sessions in Family Mediation*, 2 *Negotiation J.* 257 (1986). Thus, for those parties who desire to avoid a personal meeting or to withhold identifying information, there is no reason why those limitations could not be honored in fashioning the ground rules of the mediation.

256. Leonard Riskin & James Westbrook, *Dispute Resolution and Lawyers* 4 (1988). In its more familiar guise as a method for resolving present disputes, mediation has been similarly defined by statute as "a process whereby a neutral third person, called a mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement." Fla. Stat. Ann. § 44.1011(2) (West 1998).

257. The Oregon statute requires a good faith attempt at mediation when later disputes arise about a post-contact agreement before an enforcement action can be filed. Or. Rev. Stat. § 109.305(4)(a)-(b) (1993). For further discussion of mediation of disputes arising out of these contracts, see *infra* text accompanying notes 311-315.

258. Some states explicitly authorize the use of mediation for the resolution of child custody and

Because mediation ensures a more considered discussion of alternatives and results in agreements which are more resistant to later deadlocked disputes, it seems ideally suited as a process for birth parents and adopting parents who are considering some sort of ongoing relationship beyond the adoption.

Mediation can achieve two primary goals. First, it ensures that any resulting agreement is both knowledgeably and voluntarily embraced. It enables the parties to identify and articulate their desires and concerns and it models collaborative decisionmaking. A skilled mediator uses sophisticated skills of structured interaction to reframe proposals to identify mutual advantage, reinforces concessions to encourage collaboration, equalizes the power between the negotiating parties, and finds an integrative set of solutions that meet the legitimate needs of both parties.<sup>259</sup> These skills are drawn from behavioral science research on the theory and dynamics of power, conflict and balance.<sup>260</sup>

The second primary achievement of mediation is that it is more effective than the adversarial or negotiating process for minimizing future conflicts between the mediating parties.<sup>261</sup> Admittedly, we can now only speculate about the incidence of post-adoption disputes over contact obligations between birth parents and adopting parents. Professor Hollinger has found no cases in which open arrangements in non-relative adoptions have "gone sour."<sup>262</sup> In a small sample of 56 open adoptions, Etter found that 100% of the biological parents abided by their written agreements.<sup>263</sup> Similarly, there is some anecdotal confirmation of harmonious post-adoption client interaction from adoption agency professionals.<sup>264</sup>

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visitation disputes. See, e.g., Alaska (Alaska Stat. § 25.20.080 (Michie 1995)); California (Cal. Fam. Code § 20019 (West 1994)); Connecticut (Conn. Gen. Stat. Ann. § 46b-53a (West 1995)); and Idaho (Id. St. RCP, Rule 16(c)(12) (1996)). Other states more generally authorize the use of mediation for the resolution of any type of dispute. See, e.g., Arkansas (Ark. Code Ann. § 16-7-101 (Michie 1995)); Colorado (Colo. Rev. Stat. Ann. § 13-22-305 (West 1995)).

259. There is robust literature on the goals and dynamics of the mediation process. See, e.g., Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (1986); Divorce Mediation: Theory & Practice (Jay Folberg & Ann Milne eds., 1988); Orna Cohen & Naomi Dattner, *The Role of the Mediator in Family Mediation*, 13 *Mediation Q.* 125 (1995).

260. *Studies in Social Power* (Darwin Cartwright ed., 1959); Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (1973); Fritz Heider, *The Psychology of Interpersonal Relations* (1958).

261. Kent E. Menzel, *Judging the Fairness of Mediation: A Critical Framework*, 9 *Mediation Q.* 3 (1991). For a study finding substantial but short-term effects for mediating couples, see Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 *Behav. Sciences & L.* 387 (1991).

262. Hollinger, *supra* note 19, § 13.02[3], at 13-60. Cf. *Hill v. Moorman*, 525 So. 2d 681 (La. App. 1st Cir. 1988), discussed *supra* in text accompanying notes 131-132.

263. Etter, *supra* note 189.

264. During May 1992, Volunteers of America began offering openness in adoption . . . and has had considerable success with openness in adoption. Most all placements during the past three years started with a level of semi-openness. Some have started on a fully open basis. Only a few can be described as closed or traditional. Many of the adoptions that started on a semi-open basis have changed to a fully open status after the birth and adoptive parents had a chance to get to know each other. There have been no major problems with VOA open adoptions. There have been a few disappointments when people did not live up to someone's imagined expectations or when ongoing contact was not maintained at the

However, the legitimacy of open adoption arrangements is still too new to generate the necessary longitudinal data, and caution appears to be in order.

If post-divorce relationships can be analogized to post-adoption relationships, then we should be very wary about the fragility of a contact agreement. In their seminal national study of the resolution of grievances, Miller and Sarat found that post-divorce disagreements were the "most disputatious and litigious grievance type we have measured," with the retention of lawyers in nearly 60% of the cases.<sup>265</sup>

Perhaps there are significant differences between the etiology of divorce and adoption that might promise less future conflict. In non-relative adoptions, unlike divorce, typically there are no scars of interactive failures, no emotionally-laden rift that brings them to the contractual negotiation. In adoptions, both the birth parents and the adopting parents desperately need the cooperation of the others in order to bring about the transfer of the child. In contrast, the expectations and mind-frame of divorcing parents are likely to be quite different: Each has an established relationship with the child and may well believe that he or she can parent the child best without the assistance (or interference) of the other parent. Consequently, as of the time of execution, we might well intuit that the parties to a post-adoption contact agreement would have a greater reservoir of good will available that would minimize future disputes and the need for subsequent court enforcement of their agreement.

However, as time passes after the adoption and the parties experience some degree of child-sharing, emotionally they become more and more like divorcing pair(s) of parents. Once having come together, their lives now diverge. Changes in circumstances are inevitable. Their life-styles and parenting philosophies may become quite different, and the desire of the adopting parent-custodian to control the counterinfluences in the child's life may eclipse empathy for the needs of the birth parents or deference to the child's eventual needs to realize his or her genetic connections. Although it is undeniably true that today American culture countenances "more fluid notions of what constitutes a family,"<sup>266</sup> the law's

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frequency hoped for. These are issues with which people can deal. And VOA staff is always available to help if needed.

Caffarel, *supra* note 12.

265. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & Soc'y Rev. 525, 561 (1980-81). No one knows precisely how many custody disputes are litigated each year, but some national assessments indicate that 35,000 or 10% of all divorces involve custody trials. See Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 Minn. L. Rev. 427, 454 n.105 (1990). All too frequently, divorced parents wage unrelenting enforcement or modification litigation. See *Turner v. Turner*, 455 So. 2d 1374 (La. 1984); *Dodd v. Dodd*, 403 N.Y.S.2d 401 (N.Y. Sup. Ct. 1978).

266. Appell (1995), *supra* note 15, at 1008. Estimates based on 1980 census figures are that 40% of all American children spend at least some period of their childhood living with families in which one or both biological parents are absent. Bureau of the Census, *Current Population Reports, Special Studies Series P-20*, No. 380, Bureau of the Census, *Marital Status and Living Arrangements*: March 1982, A 5, Table F (Wash. D.C. 1983). From 1970 to 1994, the percentage of White children living

dominant conceptualization of exclusive parenthood within a nuclear family still effects individual behavior and idealizations.<sup>267</sup> More importantly, despite the reality of their own experience, many divorced and adopting parents may cling to the nuclear family as a behavioral ideal, even if not a cultural norm. Finally, we should anticipate that contact arrangements will need future modification; the intractable problem with any child-centered arrangement is that the child is a constantly shifting target of concern,<sup>268</sup> steadily progressing through a series of developmental stages, each bearing a different set of needs and maturational tasks. Agreements forged when the child is an infant may not work when the child reaches latency or adolescence.<sup>269</sup>

Although not a panacea for eliminating all future disputes, mediation does produce greater client satisfaction and less litigation than do court-imposed orders or lawyer-negotiated settlements.<sup>270</sup> Requiring mediation before biological and adopting parents enter into any agreement seems well worth any additional time and expense. Precisely because they are enforceable in our model and carry the potential for embroiling the child in future disputes, such agreements should be subjected to process restraints with proven effectiveness for minimizing misunderstanding and conflict.<sup>271</sup>

Thus, we submit that legislatures should cautiously endorse post-adoption contact agreements. The three premises of our proposed model statute authorizing and regulating such agreements for infant adoptions are that the child's best interest cannot be isolated from those of consenting, caring adults; that only consensual arrangements should be authorized; and that mediation is the appropriate process.

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in such families more than doubled (10.5%-23.9%), and the percentage of Black children increased by a third (41.5%-66.6%). Statistics for children of Hispanic origin are unavailable for the 1970 census. As of 1994, 36.5% of these children were living with families lacking one or both biological parents. Bureau of the Census, *Current Population Reports*, P20-484, *Marital Status and Living Arrangements: March 1994*, Fig. 3, p. x (Wash. D.C. 1996).

267. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879 (1984).

268. See John E. Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. Rev. 307 (1991).

269. Erikson (1950), *supra* note 113.

270. Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 L. & Soc'y Rev. 585 (1987); Raymond A. Whiting, *Family Disputes, Nonfamily Disputes, and Mediation Success*, 11 Mediation Q. 247 (1994); Judith S. Wallerstein & Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (1980); Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 Beh. Sci. & L. 387 (1991).

271. Professor Hollinger speculates on a similar theme. She notes in searching for an explanation for why there are so few reported disputes, "From a more sanguine perspective, these open arrangements may be so well negotiated, and the parties so careful in their selection of each other, that they survive over time." Hollinger, *supra* note 19, § 13.02[3], at 13-61.



for reaching (or failing to reach) any agreement.<sup>272</sup> With these premises in mind, we now turn to the specifics of a model statute.

#### A. *The Articulation of Purpose*

A striking omission of all of the extant statutes is that there is no articulation of legislative purpose or of public policy supporting recognition of post-adoption contact. Indeed, the central feature of the current statutes is the removal of the jurisprudential barrier to enforcement without further elaboration of rationale: for example, Washington's statute provides, "Nothing in this chapter shall be construed to prohibit the parties . . . from entering into agreements regarding communication with or contact. . . ."<sup>273</sup> Such approach connotes a defensiveness that denigrates the value of such agreements and occludes their justifiability.

A purpose article should be included as guidance for professionals representing parties in confecting such agreements and for the courts in construing and enforcing them. A statute approving cooperative adoptions should contain a legislative finding or statement of purpose affirming that when both the biological and adopting parents agree upon arrangements for continuing contact, the adopted child's best interest is well served. In an infant adoption, the child's interests are fully protected by the mediation of the biological and adopting parents.<sup>274</sup> Consequently, we believe that the New Mexico statute's creation of a presumption that the agreement serves the child's best interest is justified. Such a provision would not be novel; indeed, it is nothing more than an extension of the traditional presumption of the parental rights doctrine. Thus, a Purpose provision might read:

##### *Section 1. Purpose*

*The purpose of this chapter is to authorize continuing contact after a final decree of adoption between an adopted child and members of his biological family or others<sup>275</sup> in order to promote the child's best interest, including the child's needs for psychological continuity and a complete*

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272. We should note that the use of mediation in family controversies is not without its critics. Professor Fineman has argued that the combined recent trend toward joint custody and mediation is a dangerous professional power shift from lawyers and the legal system to the "helping professions." She points out that the justice of any resolution depends upon the reflection of widely held values and the accuracy of fact-finding, essentials best preserved by laws and the legal process. Feminist theoreticians have also expressed alarm, arguing that mediation cannot correct persistent power imbalances that disadvantage mothers in the private ordering of custody resolution. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff. L. Rev. 441 (1992). While we acknowledge the legitimacy of these ideas, on balance, we believe that greater harm is produced for children by the adversarial system.

273. Wash. Rev. Code Ann. § 26.33.295(1) (West 1995).

274. For a provocative discussion of the possibility that continuing commitment to a child by multiple family members more than compensates for the potential for conflict, ensuring a system of checks and balances on caretakers' decisions, see Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. Chi. L. Rev. 1317 (1994).

275. The issue of the scope of continuing contact is discussed *infra* in the text accompanying notes 282-289.

*sense of identity as he or she matures. For infants and very young children, a presumption arises that a knowing and voluntary agreement regarding continuing contact reached between the child's biological parents and adopting parents does serve the child's best interests. In enforcing such agreements, the courts shall deem the child's interests to be paramount, including the child's need to integrate into the adopting family, the child's need for stability including his or her reaction to continued contact, and the child's need for cooperative interaction between the contracting adults.*

#### *B. Ensuring Knowledge of the Contractual Option*

Bridging the gap between the written law and a citizen's knowledge about its important authorized options is critical to informed decisionmaking. The Ohio statute imposes a duty upon agency staff and attorneys who arrange private adoptions to inform their clients, both biological parents and adopting parents, of the post-adoption contact agreement option.<sup>276</sup> Furthermore, the statute reflects the fact that such agreements are the client's prerogative rather than a policy choice of the professional. If the parent and prospective adoptive parent agree to the terms of the agreement, the professional shall "provide for the open adoption."<sup>277</sup>

Certainly both sets of clients should be informed about all options and the range of possibilities, from completely confidential to fully open and counseled, as each considers this serious issue. The inclusion within a model statute of a provision that underscores the client's autonomy and includes an opportunity for counseling seems entirely appropriate. Furthermore, clients deserve a copy of laws that affect their informed decisionmaking. Reading the law may also stimulate many clients to ask appropriate questions and to explore misgivings with the adoption specialist, thus promoting exchange and counseling.

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276. Ohio Rev. Code Ann. § 3107.62 (West 1996).

277. Ohio Rev. Code Ann. § 3107.63(A) (West 1996). At the present time not all adoption specialists wholeheartedly embrace the confection of such agreements. Reflecting that division, the Ohio statute permits the professional to decline to assist the client who wants such a service as a part of the adoption; if so, the professional is required to make an appropriate referral to another, willing resource. Section 3107.63(B) states: "An agency or attorney arranging a child's adoptive placement may refuse to provide for the birth parent and prospective adoptive parent to enter into an open adoption. If the agency or attorney refuses, the agency or attorney shall offer to refer the birth parent to another agency or attorney the agency or attorney knows will provide for the open adoption." Aside from problems of statutory expression, we believe that such a provision is unnecessary. As a matter of sound practice and ethics, any doctor, lawyer, accountant or other professional who disagrees with the provision of a particular service or for other reasons cannot provide the service can and will decline and refer the client to someone else. Furthermore, if a carefully drawn statute is enacted, many of the fears and misgivings of professionals about post-adoption contact may be mitigated.

*Section 2. Information about post-adoption contact agreements*

*Any agency [or individual] authorized to place a child for adoption shall inform the biological parent and the prospective adoptive parent about options, including the availability of a post-adoption contact agreement. This duty to inform shall also include an explanation of the available range of terms, the process for negotiating an agreement and, if agreement is reached, its enforceability, in accordance with this Chapter. A copy of this Chapter shall be provided to the biological parents and to the prospective adoptive parents. The agency [or individual] may make appropriate referrals as necessary to assist the parties.*

*C. Insulation of the Contact Agreement from the Surrender for Adoption*

As earlier demonstrated in our discussion of the jurisprudence in Part IV, a principal barrier to authorization of continuing contact has been the courts' confusion of parental status with visitation or lesser forms of contact, the fear that continued association was incompatible with an unconditional surrender of parenthood necessary for adoption. Each of the current statutes resolves that important issue, though in varying ways. Oregon's statute provides:

Failure to comply with the terms of an agreement made under subsection (2) of this section is not grounds for setting aside an adoption decree or revocation of a written consent to an adoption.<sup>278</sup>

The New Mexico statute goes further by requiring that acknowledgement of this principle be incorporated into any contact agreement:

Every agreement entered into pursuant to provisions of this section shall contain a clause stating that the parties agree to the continuing jurisdiction of the court and to the agreement and understand and intend that any disagreement or litigation regarding the terms of the agreement shall not affect the validity or the relinquishment of parental rights, the adoption or the custody of the adoptee.<sup>279</sup>

The Indiana statute also requires a concomitant acknowledgement by the adopting parents that they understand that the birth parents have a right to seek enforcement of the agreement.<sup>280</sup>

We propose that a model statute should explicitly insulate the adoption, the creation of a new legal status, from the agreement for continuing contact. The distinction between the effects of the two judgments is critical to the child's stability: the adoption decree remains final and unmodifiable, whereas the

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278. Or. Rev. Stat. § 109.305(3) (1996).

279. N.M. Stat. Ann. § 32A-5-35(D) (West 1996).

280. Ind. Code Ann. § 31-19-16-3(2) (West 1999).

judgment incorporating the agreement must be modifiable as the circumstances affecting the parties inevitably change. To avoid any possible challenge that either an adoption surrender or the judgment is conditional upon compliance with the agreement, the surrender and judgment should contain no mention of the agreement.<sup>281</sup> A separate court order should be required to confirm the agreement as part of the parties' negotiation of the collateral issue of continuing contact.

Following the New Mexico and Indiana models, we believe that the agreement should explicitly recite the parties' understanding of enforceability but that breach of their agreement has no effect on the judgment of adoption.

### *Section 3. Effect of a post-adoption contact agreement*

*A. Failure to comply with the terms of an agreement made pursuant to this Chapter is not grounds for setting aside an adoption decree or revocation by a biological parent of a written consent to an adoption or for any action seeking the child's custody.*

*B. In order to be enforceable as a valid agreement in accordance with Section 8, a post-adoption contact agreement must recite the parties' understanding of the fact that any dispute or litigation regarding the terms of the agreement shall not affect the validity or the relinquishment of parental rights, the adoption or the custody of the adopted child although the biological parents may seek enforcement of the terms of the agreement.*

### *D. Subject Matter of the Agreement*

Any model statute should resolve two central ambiguities: what kinds of continuing contact and which ongoing relationships with the child are permitted. The current statutes are quite vague about the potential types of interaction.<sup>282</sup> Only

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281. Cf. N.Y. Soc. Serv. Law § 383-c (McKinney 1996). The New York statute requires that any post-adoption contact agreement be spelled out in the surrender document. Rather anomalously, however, the court is required to seek reassurance from the parent that the surrender is not the product of any inducements. Thus, this process becomes rather like the "Boykinization" of an accused in which all players are presumed to know that bargained for reduction in the grade of the offense or the sentence is not the sort of inducement that would vitiate the voluntariness of the guilty plea. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969). For a transcript and discussion of judicial inquiry concerning the voluntariness of a surrender for adoption, see *Petition of Steve B.D.*, 723 P.2d 829 (Idaho 1986).

282. The Oregon statute authorizes simply "continuing contact," Or. Rev. Stat. § 109.305(2) (1995). The Alaska statute authorizes only "visitation," Alaska Stat. § 25.23.130(c) (Michie 1995), though arguably less intrusive contact would be included within that recognition of the more intrusive interaction. Washington authorizes "communication" or "contact," Wash. Rev. Code Ann. § 26.33.295(2) (West 1995). The Ohio statute authorizes "open adoption," specifically endorses the release of identifying information, Ohio Rev. Code Ann. § 3107.61 (Baldwin 1996), and then negates the authority to contract about some issues, leaving everything else to negotiation. Section 3107.65(A) prohibits the parties from agreeing to make an adoption more confidential than permitted by other provisions of Ohio law which grant access to the social or medical histories of the birth parent, to a copy of the contents of the child's adoption file, and to nonidentifying information. Uniquely, this Section also forbids the birth parent or relative "to share with the prospective adoptive parent parental control and authority over the child placed for adoption or in any manner limit the adoptive parent's full

the New Mexico statute alludes to the potentially infinite variety of arrangements that might be tailored to the needs and desires of the parties: "The contact may include exchange of identifying or nonidentifying information or visitation between [biological family members and the adopting parents] or visitation between [biological family members] and the adoptee."<sup>283</sup> As previously outlined, the purpose of a cooperative adoption agreement in an infant adoption is to permit the birth parents and adopting parents to negotiate their agreement according to their own perceptions of their "comfort levels" of openness.<sup>284</sup> We believe that any model statute should underscore the expectation of a uniquely negotiated agreement and should at least suggest to interested parties and their representatives the range of possible alternatives, including the authority to use intermediaries for any exchange of information or visitation.

All of the statutes except Washington's, which is limited to birth parents,<sup>285</sup> broaden the class of those who may be permitted continuing contact with the child to include other biological relatives. Oregon's provision is a verbatim copy of the language proposed in the "Model Adoption Act and Model State Adoption Procedures" promulgated in 1980 by the Department of Health, Education and Welfare, as the federal agency was then known.<sup>286</sup> The Oregon statute provides:

Nothing in the adoption laws of this state shall be construed to prevent the adoptive parents, the birth parents and the child from entering into a written agreement, approved by the court, to permit continuing contact between the birth relatives and the child or the adoptive parents.<sup>287</sup>

To avoid any potential ambiguity it goes beyond the Model Act to define "birth relatives" as "birth parents, grandparents, siblings and other members of the child's birth family."<sup>288</sup>

Consistent with our view that each agreement must be uniquely negotiated, we believe that the parties should be given the latitude to choose from among the widest possible assortment of biological family members. Indeed, we have qualms about limiting potential contact to only biological family members. Many American families are bound together by psychological bonds that are neither legally recognized nor biologically based.<sup>289</sup> We can envision a scenario in which

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parental control and authority over the adopted child." Ohio Rev. Code Ann. § 310.65(A)(1) (Baldwin 1996). Given the vagueness of this admonition, the provision is probably simply a *deau geste*, extended perhaps to acknowledge the Ohio Supreme Court's worries in the *Zsach* case, discussed *supra* in the text accompanying notes 136-144, 162-164. The much more powerful limitation is the withdrawal of the parties' authority to confect an enforceable post-adoption contact agreement, § 3107.65(A)(1) and (C). This aspect of the Ohio statute is addressed in the *infra* text accompanying note 304.

283. N.M. Stat. Ann. § 32A-5-35(A) (Michie 1996).

284. See *supra* text accompanying notes 123-127.

285. Wash. Rev. Code Ann. § 26.33.295(1) (West 1995).

286. 45 Fed. Reg. 10622 (Feb. 15, 1980), § 104(c).

287. Or. Rev. Stat. § 109.305(2) (1995).

288. Or. Rev. Stat. § 109.305(2) (1995).

289. See Bartlett, *supra* note 267; Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973) and *Before the Best Interests of the Child* (1979).

a biological mother has been raised her entire life by a nonrelative. According to the current statutes, that *de facto* "Auntie" could not be included in any contact arrangements, even though she may have more abiding concern for the child's welfare and more information to impart to the child about the child's social, cultural and biological heritage than any of the child's blood relatives. Though we admit that broadening the class of persons permitted to have contact may be politically controversial, we would trust the mediation process to result in the wise selection by the parents of suitable adults eligible for some contact with the child.

*Section 4. Content of the agreement; contact provisions; effected persons*

*A. A post-adoption contact agreement must accommodate the needs and tolerances of both the biological and adopting parents and is subject to any limitations mutually negotiated by them. The agreement may authorize direct visitation between members of the child's biological family or others and the child, in either the adopting parents' home or elsewhere through a mutually agreed upon intermediary. The parties may agree to more limited arrangements between members of the child's biological family or others and the adopting parents or the child, such as, communication by telephone or mail, the exchange of either identifying or nonidentifying information, or other forms of contact.*

*B. The term "members of the child's biological family" means the child's birth parents, grandparents, siblings and other biological relatives.*

*E. Representation and Other Process Issues*

A model statute must ensure that the parties to the cooperative agreement are adequately represented during the crafting of the agreement and any court hearing. However, in our proposed model statute, we have consciously rejected the New Mexico proposal empowering the reviewing court to appoint a guardian ad litem for the child before accepting a proposed agreement.<sup>290</sup> All too often when faced with a dispute involving a child, the law's solution is to throw another lawyer or *guardian ad litem* into the fray who is charged with divining the child's interests. In reviewing a proposed agreement affecting a young child, predictably such representation will be simply a pro forma obligation. At this stage of the child's development, the child's interests cannot be isolated from those of consenting, caring adults. In an infant adoption, the appointment of a special *guardian ad litem* seems like a complicating and needless additional expense providing no additional protection for the child.<sup>291</sup> In contrast, as we will discuss later, the appointment of

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290. N.M. Stat. Ann. § 32A-5-35(B) (Michie 1996). This statute permits the court to appoint a guardian ad litem for the child and requires the appointment when "visitation between the biological family and the adoptee is contemplated."

291. The appointment of a *guardian ad litem* may be sound public policy for the older adopted child who is capable of expressing independent views. In those situations, the statute should be patterned on the jurisdiction's view of the role of the child in custody and visitation disputes: for example, if and how the child's views are to be solicited by the court and whether his or her views are

a representative for the child becomes appropriate and necessary only if subsequent enforcement litigation arises between the biological and adopting parents.

In contrast, during the adoption negotiations, the birth parents and adopting parents are in great need of adequate representation. As one veteran adoption specialist has cautioned:

People contemplating adoption are vulnerable. It is easy for them to be taken advantage of. Most have no prior personal experience with adoption. They do not know the issues and complexities involved. They do not know the key questions to ask. They are not in a position to assess the quality of the services they are receiving. Add to this, varying degrees of fear and desperation—birth parents knowing time is limited to make decisions and wondering if anyone will want and be good to their baby, prospective adoptive parents grappling with the pain of infertility and fearing that they will never have a chance to be parents. In such situations, it is easy for feelings of desperation to set in. At such times, people can easily be led to make decisions and agreements they really do not want and in other circumstances probably would not even consider. And sad to realize, there are people in our society who understand this and are all too willing to take advantage of this vulnerability of people in need of assistance, especially if large sums of money are involved.<sup>292</sup>

The use of a professional mediator during the negotiation of any agreement should allay most of our concern that the parties are educated about the range of alternatives and are protected from overreaching. Though many adoption agencies offer mediation services, an independent mediator should be appointed by the court. The opportunities for overreaching in order to achieve an adoption are considerable. The appointed professional should be experienced and knowledgeable not only about mediation but also about the range and risks of post-adoption contact.

If the parties cannot reach an agreement about continuing contact and either party insists on such a provision, then the adoption fails. Unlike attempts to mediate child custody disputes, there is no litigation alternative and any cooperative adoption statute should eliminate that possibility. Our model only contemplates consensual post-custody arrangements.

In addition, in most states, independent counsel is required to advise and represent a birth parent during his or her consideration of whether to execute a surrender for adoption and to ensure that execution of any surrender is done

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binding on the court. In many states, an older child retains the right to "veto" any proposed adoption. According to § 2-401(c) of the Uniform Adoption Act, 9 U.L.A. (1964), the "informed consent" of a minor who is twelve or older is required unless dispensed with by the court. Consistent with such a stance, an older child's consent might be required for any proposed post-adoption contact agreement. The Indiana statute, which is limited to adoptions of children who are over two years of age, requires the consent of a child who is twelve years of age or older to any post-adoption visitation. Ind. Code Ann. § 31-19-16-2(6) (West 1999).

292. Caffarel, *supra* note 12.

voluntarily with full knowledge of its consequences. Ordinarily, if not invariably, the adopting parents will secure legal representation in order to ensure that theirs is a "fail-safe" adoption. Certainly legal representation should encompass the review of any mediated post-adoption contact agreement.

*Section 5. Procedure for confecting a post-adoption contact agreement; mediation*

*A. The biological parents and the adopting parents shall be required to participate in mediation in negotiating and drafting any agreement for post-adoption contact. The court shall appoint an independent, professional family mediator qualified to conduct such a process.*

*B. Any resulting agreement shall be reviewed and approved by counsel for the biological parents and counsel for the adopting parents.*

*F. Formalities*

The statutes of New Mexico, Oregon, and Washington require that the agreement between the parties must be written. In at least two cases, courts have avoided ruling on the enforceability of post-adoption contact by finding that there was no "clear understanding" between the parties<sup>293</sup> or a "secret agreement."<sup>294</sup> Although general contract principles would permit proof of an agreement implied from the parties conduct, requiring an express, written agreement underscores the importance of the promises, resolves conflict about the mutuality of the agreement, and reduces disputes over the precise terms of contact.

*Section 6. Formalities; required declarations*

*Every post-adoption contact agreement shall be in writing and signed by the biological parents and counsel and by the adopting parents and counsel. Every agreement in order to be enforceable in accordance with Article 8 must recite the following declarations:*

*(1) That the parties have freely and voluntarily entered into this agreement and that it reflects their intent to be bound by its terms, unless later modified by a replacement mediated agreement or by court order.*

*(2) That the biological parents have been informed and understand that upon the execution of the agreement, any dispute or litigation regarding its terms shall not affect the validity or the relinquishment of parental rights, the adoption or the custody of the adopted child.*

*(3) That the adopting parents have been informed and understand that the biological parents may seek enforcement of the terms of this agreement by a civil action.*

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293. In re Adoption of J.H.G., 869 P.2d 640, 648 (Kan. 1994).

294. In re Hamner, 487 P.2d 417, 420 (Ariz. Ct. App. 1971). See also In re Petition of S.O., 795 P.2d 254 (Colo. 1990): Despite a verbal agreement for post-adoption visitation and actual visitation by the biological father, the court found that he signed an unambiguous written consent to the adoption. The court held that, father had knowingly, intelligently and voluntarily consented to adoption.



*G. The Role of the Court*

The statutes of New Mexico, Oregon and Washington go further by requiring court approval of the parties' agreement. Certainly a requirement of court approval of any agreement affecting the child is not novel in family law negotiations. Court approval is nearly universally required before a post-separation custody agreement between divorcing parents is incorporated into the court's judgment. In theory, the court is to scrutinize the agreement in order to ensure that the provisions adequately protect the child's interests. In practice, the court only superficially reviews any agreement of the parents and will approve it unless it contains provisions that are radical departures from settled norms. If the agreement has resulted from formal mediation, the court is most likely to defer to the greater expertise of the parents manifested by their agreement; indeed, some mediation statutes expressly direct the court to accept the agreement unless the court makes specific findings of fact that the agreement does not serve the child's best interest.<sup>295</sup>

The statutes of Washington<sup>296</sup> and New Mexico<sup>297</sup> authorize the court to reject the agreement unless it finds that it would be in the child's best interest.<sup>298</sup> The "best interest of the child" has been severely criticized for its vagueness, constituting a legislative sanction of judicial arbitrariness in child custody decisionmaking.<sup>299</sup> An even greater problem posed by court review of post-adoption contact agreements is that unlike post-divorce custodial arrangements, as of now there is no settled body of law, no "shadow of the law"<sup>300</sup> to guide a court in making the review at the time of the adoption.

Furthermore, at this stage of the proceedings expert witnesses are likely to be unhelpful. Only the grossest sorts of projections can be made regarding future human behavior of any individual, based on past reports or current observations. Anna Freud called such predictions "difficult and hazardous."<sup>301</sup> Unlike later review of the continued feasibility of a particular agreement in a particular

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295. See, e.g., La. R.S. 9:332 (Supp. 1999).

296. Wash. Rev. Code Ann. § 26.33.295(2) (West 1996).

297. N.M. Stat. Ann. § 32A-5-35(c) (Michie 1978).

298. The Ohio statute is slightly more specific. Unless the court finds that the agreement is not within the child's best interest or impinges upon certain enumerated subjects withdrawn from negotiability, the court may not nullify or alter the terms of the parties' agreement. Ohio Rev. Code Ann. § 3107.65(B) (Baldwin 1996). For enumeration of the terms withdrawn from negotiability, see *supra* note 282.

299. Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (1975); Goldstein et al., *supra* note 289; David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477 (1984).

300. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 951-96 (1979). They hypothesize that established legal doctrine influences the terms of out-of-court or negotiated bargains as well. See also Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992).

301. Anna Freud, *Child Observation and Prediction of Development: A Memorial Lecture in Honor of Ernst Kris*, 13 The Psychoanalytic Study of the Child 97, 98 (1958). An entire body of research known as systems theory hypothesizes that linear predictions cannot be made in a world of complex and circular causality. See Marlow & Sauber, *supra* note 251.

adoption, any initial review at the time of the proposed adoption will necessarily be a theoretical one. If we believe that consensual arrangements regarding openness in adoption can serve the interests of adopted children better than a monolithic secret model, then contact agreements should be authorized. Furthermore, if we believe that the mediation process will produce a mutually satisfying arrangement, then the particular agreement should be approved. These twin premises suggest that the agreement-reviewing role of the court at this stage of the proceedings ought to be very limited. While we would not lightly discard the court's *parens patriae* responsibility to oversee any child-centered proceeding, we would reiterate the principle of the purpose article and accord presumptive validity to any agreement reached by properly represented parties.<sup>302</sup> If a court rejects an agreement, it should be required to set forth specific reasons as findings of fact in support of its decision to override the parties' agreement. Only then can legitimate concerns surface for appellate review, thus guiding the course of future parties' negotiations.

*Section 7. Court approval; incorporation into judgment*

*A. At the time an adoption decree is entered, the court entering the decree may approve a post-adoption contact agreement executed in conformity with the requirements of this Chapter. If approved, the agreement shall be incorporated into a judgment of the court.*

*B. A presumption arises that a knowing and voluntary agreement regarding continuing contact reached between the child's biological parents and adopting parents serves the child's best interests. In order to reject the agreement, the court shall make a specific finding of fact in support of its conclusion that the child's interests would not be served by approval.*

*H. Continuing Jurisdiction: Enforcement and Modification*

Courts routinely enforce commercial contracts, granting specific performance of promises or damages when a breach of obligation has occurred. Obviously, without a right of enforcement, parties would not be induced to strike bargains or enter into contracts. Given the social utility and moral force of agreements, when adopting parents commit to honor post-adoption contact and then may renege without any burden of proving that the child's best interest is disserved, as in *Hill v. Moorman*,<sup>303</sup> the court's refusal of enforcement is shocking. Equally surprising is the Ohio legislature's decision to authorize "open adoption" while at the same time flatly denying enforceability to any complying agreements.<sup>304</sup>

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302. The Oregon statute appears to take this tack: If an agreement is submitted, the court will approve it. Or. Rev. Stat. § 109.305(2) (1993).

303. 525 So. 2d 681 (La. App. 1st Cir. 1988), *see supra* discussion in the text accompanying notes 131-132. *See also* In re Adoption of J.H.G., 869 P.2d 640 (Kan. 1994), discussed *supra* in the text accompanying notes 133-135, and *Lowe v. Clayton*, 212 S.E.2d 582 (S.C. 1975), discussed *supra* in note 128.

304. Ohio Rev. Code Ann. § 3107.65(C) (Baldwin 1996) states:

Admittedly, the enforcement of contracts between parties in a familial relationship has proved to be more problematic than ordinary contracts, although there is a clear trend toward recognition of private ordering in both the spousal and the parent-child relationships.<sup>305</sup> The statutes of New Mexico, Washington and Oregon all expressly provide for enforcement provided the agreement continues to meet the child's best interest. Changes in circumstances between the time of contracting and the time of court review usually result in a finding of judicial power to modify the terms of the contract or judgment.<sup>306</sup> The statutes of New Mexico and Washington expressly provide for enforcement and have simply imported the substantive standard and adversarial procedure of actions traditionally used to resolve child custody disputes. The movant bears the burden of proving a change of circumstances as a result of which the child's best interest is no longer well served.<sup>307</sup> The Washington statute even allows costs and attorneys' fees for the prevailing party.<sup>308</sup>

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All terms of an open adoption are voluntary and any person who has entered into an open adoption may withdraw from the open adoption at any time. An open adoption is not enforceable. At the request of a person who has withdrawn from an open adoption, the court with jurisdiction over the adoption shall issue an order barring any other person who was a party to the open adoption from taking any action pursuant to the open adoption.

Even if the parties are willing to bind themselves to enforceability, this power is expressly withdrawn: "No open adoption shall . . . [p]rovide for the open adoption to be binding or enforceable." Ohio Rev. Code Ann. § 3107.65(A)(5) (Baldwin 1996).

305. The 1970s was a watershed period in American family law. One by one, states embraced "no fault" divorce, thus moving away from collectively imposed norms, expressed as justification or grounds for dissolution, and toward private ordering of the marital relationship including dissolution. The role of the courts shifted from judging the merits of the marriage's intolerability to confirming the decision of both and ultimately, either of the marriage partners. Uniform Marriage and Divorce Act (1970), 9A U.L.A. 200 (1987) § 302. Increasingly, courts have recognized the enforceability of pre-nuptial contracts. Uniform Premarital Agreement Act (1983), 9B U.L.A. 369 (1987). Similarly, in the 1980's the legal doctrinal revolution regarding private control of the rights and obligations of marriage spread to the parent-child relationship. "Joint custody" quickly became the national norm and courts were enjoined to defer to custody, visitation, and decisionmaking plans developed by the parents if they could agree. Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 Int'l Law & the Fam. 106-26 (1988); Uniform Marriage and Divorce Act, §§ 403, 408, 409 (1970), 9A U.L.A. 375, 437-39 (1987).

306. Section 409 of the Uniform Marriage and Divorce Act (1970), 9A U.L.A. 439 (1987) is typical. The court may modify a prior child custody decree "upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child." § 409(b). The Uniform Act is atypical in that it tolls the modification remedy for two years after any earlier decree, unless there is a sworn allegation that the child's health is endangered. § 409(a).

307. The New Mexico provision states:

The court shall retain jurisdiction after the decree of adoption is entered for the purpose of hearing motions brought to enforce or modify an agreement entered into pursuant to the provisions of this section. The court shall not grant a request to modify the agreement unless the moving party establishes that there has been a change of circumstances and the agreement is no longer in the adoptee's best interests.

N.M. Stat. Ann. § 32A-5-35(E) (1978).

308. Wash. Rev. Code Ann. § 26.33.295(4) (West 1996).

Agreements that call for the continuing exchange of updated information or communication between the biological and adopting families are not likely to create enforcement problems for the courts.<sup>309</sup> Upon a showing of willful noncompliance, the court's contempt powers could appropriately be employed. Agreements promising personal visitation between the biological family and the child pose greater difficulties. The court's post-divorce enforcement and modification power in custody and visitation disputes is far from an ideal model for use in visitation disputes after the child's adoption. Even when all evidence confirms that the child's interests would be served by enforcement, the traditional remedies may not achieve parental compliance. As has been more fully developed elsewhere, the law can sanction the creation of an intimate relationship such as husband and wife or parent and child or prescribe the consequences upon dissolution of those relationships, but it is nearly helpless to shape behaviors between individuals who must remain in relationship but are antipathetic to cooperative enterprise.<sup>310</sup> There is little to suggest that the traditional use of contempt remedies for violations would be any more effective in the context of post-adoption visitation disputes than in post-divorce disputes. An adopting parent who must help a child readjust following some personal contact from the child's biological parent may perceive that the child is suffering harm from the interaction and seek to end the contact. Similarly, if the child communicates any dissatisfaction about the adoptive home during an authorized type of contact, the biological parent may perceive that the child must be protected by increased contact or monitoring. In either situation, the parent is not likely to be more cooperative or reassured if the court requires continued contact.

Realization of the ineffectiveness of court-imposed mandates in intra-family conflicts may well explain the tremendous growth in the use of alternative dispute mechanisms, particularly mediation, to resolve child custody and visitation cases.<sup>311</sup> Mediation is imposed as a prerequisite for actions either to enforce or to modify the terms of a post-adoption contact agreement by the Oregon statute:

An agreement [made in compliance with this law] may be enforced by a civil action. However, before a court may enter an order requiring enforcement [or modification], the court must find that the party seeking enforcement participated, or attempted to participate, in good faith in mediating the dispute giving rise to the action prior to filing the civil action.<sup>312</sup>

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309. See, however, the finding that some adopting parents do not share information received from biological family members with the child discussed *supra* in note 221.

310. James W. Bowers and John P. Bigelow, *The Economics of Relationships and The Limits of the Law* (on file with authors); Donald J. Black, *The Behavior of Law* (1976); Robert C. Ellickson, *Order Without Law* (1991).

311. Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 L. & Contemp. Probs. 221 (1995). See also *supra* note 258.

312. Or. Rev. Stat. § 109.305(4)(a) (1993) authorizes enforcement actions. Section 109.305(4)(b) authorizes modification using parallel language.

The Oregon statute avoids making valid agreements easily modifiable and thus reinforces the original expectations of enforceability. Unless the biological and adopting parents agree to the modification, the court must find that the subsequent occurrences of "exceptional circumstances" justifies modification.<sup>313</sup>

Submission of any disagreements to mediation is a much more viable means of resolving conflicts and achieving modification of chafing or otherwise unworkable arrangements of the initial contact agreement.<sup>314</sup> Although mediation may not produce a new agreement, its potential success should be exhausted before the parties resort to adversarial litigation. Like the Oregon statute, our proposed model statute requires attempted mediation of any dispute over the terms of the contact agreement, and without an agreement for modification, limits the court's power to rewrite the contract. However, we submit that the standard for court modification should be child-focused. Reasonable persons can disagree about the extent of the limitation and its phraseology: a finding that unless modification is granted, the "child's physical, mental, moral, or emotional health would be endangered," the child's "emotional development would be significantly impaired," or "the harm likely to be caused by a change [in the agreement's terms] is outweighed by its advantages to him."<sup>315</sup> Until we have more data about the types of post-adoption contact disputes, their intensity, and their impact on the child's development, we have opted for the least onerous judicial limitation, a balancing of the benefits and detriments of any change to the child. If such litigation becomes necessary, due to the conflict of opinion between the adopting parents and the biological parents, an independent *guardian ad litem* should be appointed to represent the child. Presumably the trial court would also have the advantage of hearing from expert witnesses in aid of its contemplation of how the child's present needs are best accommodated.<sup>316</sup>

However, we are not very sanguine about the ability of litigation to resolve these sorts of conflicts any more than it has extinguished smoldering custody and visitation disputes. Aside from enforceability of any court-imposed judgment, resort to the adversarial system may per se destroy any prospects for cooperation and continued "openness." As the New York Court of Appeals succinctly put it: "The courts cannot assure the happiness and stability of these children; that only their parents could have done, and, hopefully can still do."<sup>317</sup>

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313. Or. Rev. Stat. § 109.305(4)(b)(A) and (B) (1993).

314. Even if the contract fails to embrace mediation for the resolution of conflicts, statutes that approve the confection of post-adoption contact agreements should direct that mediation be exhausted as a process before enforcement or modification litigation is filed.

315. In descending order of onerousness, the Uniform Marriage and Divorce Act (1970), 9A U.L.A. 282, 398-439 (1987) uses serious endangering as the standard for a denial of visitation rights to a parent, § 407; significant impairment of emotional development for continuing state supervision of custody or visitation, § 408; and the balancing of the benefits and harms of change for modification actions, § 409. The general standard for the initial allocation of custodial and visitation rights between parents is the sublimely vague, "best interest of the child" test, § 402.

316. See *Smith v. Brett*, No. FA 93 030 76 90 S, 1994 WL 411003 (Conn. Super. July 29, 1994) for a recitation of expert testimony that the trial court found to be persuasive in denying any continuing contact between the adopted child and his biological maternal grandparents.

317. *Nehra v. Uhlar*, 372 N.E.2d 4, 9 (N.Y. 1977).

*Section 8. Enforcement of post-adoption contact agreements; modification*

*A. Unless another state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act,<sup>318</sup> the court shall retain jurisdiction after the decree of adoption is entered for the purpose of hearing motions brought to enforce or modify an agreement entered into pursuant to the provisions of this chapter.*

*B. Before hearing either an enforcement or a modification motion, the court shall refer the parties to mediation. Only if the court finds that the party seeking relief has participated or attempted to participate in good faith in mediating the dispute, may it proceed to a determination on the merits of the motion.*

*C. The court shall order continuing compliance in accordance with the agreement and not modify its terms or nullify it unless it finds that the harm likely to be caused by a modification is outweighed by its advantages to the child.*

## VII. CONCLUSION

The primary policy choice dramatically presented by post-adoption contract agreements is whether there is sufficient justification for disabling parents, old and new, from crafting their own arrangements for their child's well being. As Professor Grotevant and his colleagues concluded in reporting on the National Study:

[An] adoptive father made an important point: "Different adoptions fit different situations. I don't think every glove fits every hand." Each adoptive family system contains many individuals yoked by the adopted

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318. The statutes of Oregon, Washington and New Mexico do not address the predictable situation that either the biological parents or adopting parents may move out of the state that granted the original adoption decree and approved the post-adoption contact agreement. See, e.g., *In the Matter of the Adoption of Hammer*, supra notes 156-158 and accompanying text. The Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1968), the Parental Kidnapping Prevention Act of 1980, Pub.L. No. 96-611, 96th Cong., 2d Sess., and the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 261 (1997) address and resolve questions of interstate jurisdiction by identifying the jurisdiction which has the maximum current information about and involvement with the child and his caretakers. Both the Washington and Oregon statutes do not address jurisdiction at all, referring only to enforcement by civil action. The New Mexico statute attempts to confer continuing jurisdiction on the court which entered the original adoption decree. The Uniform Adoption Act, 9 U.L.A. (Supp. 1994) has no clearly applicable provisions since it takes no stance on the performability or enforceability of post-adoption contact agreements. See *supra* text accompanying note 13.

While it is more efficient for the court of original jurisdiction to hear any subsequent dispute between the parties as long as the child still remains there, we believe that the UCCJA applies to interstate disputes over post-adoption contact. Although the UCCJA does not explicitly govern post-adoption contact disputes, unlike child support orders, such disputes are not expressly excluded. "Custody determination" is defined as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person." § 2(2).

child. The adoptive parents' perspective is only one part of the system. If one carries the hand/glove metaphor a bit further, thinking of the adoptive family system as the hand and the type of adoption as the glove, it seems plausible that each glove, or perhaps even individual fingers of the glove, may need to be knitted for each family system. Additionally, the gloves may need to be hand-knitted rather than mass produced and made of natural fibers that breathe, grow, and change with the hand.<sup>319</sup>

The accumulated scientific data do not justify the wholesale rejection of the adoption parties' contractual authority, and our model statute promotes the necessary hand-tailoring process. However, future disagreements over the course of long term relationships are predictable as the lives of biological parents and adopting parents diverge and as the child's needs change. There must be the option of continued court involvement after the ink on an adoption decree has dried.

Part of the reason why family court judges relish uncontested adoptions, preferring them to all other cases on their dockets, is their clean-cut finality. Parties in dependency, delinquency, divorce custody and custody modification cases are likely to return, demanding exercise of the court's continuing jurisdiction. At the adoption decree hearing, only the well-dressed, doting adopting parents and cuddly, bright-eyed child are present, eager for the modern miracle of legal re-birth in a courtroom. The biological parents are gone, relieved of appearance, responsibility, rights and presumably interests. The fiction is complete. Only if adopted children subsequently fit into some other category of justiciability are their needs later reviewed by courts. Their unique needs flowing from relinquishment and adoption are treated as if they did not exist.

If agreements are to be enforced, modified or nullified, obviously the adoption court must assume a limited form of continuing jurisdiction when mediation fails to resolve a dispute. As long as adoption practitioners offer the option of cooperative adoption, we will never learn about the scope and nature of the parties' disputes and the ultimate social utility of post-adoption contact agreements unless court review is ensured. Under our model statute, if the dispute cannot be resolved and the child has not developed even limited bonds with the biological parent, the court should bow to the needs and wishes of the adopting parents. If on the other hand, the child appears to greatly benefit from the contact and has developed expectations of its continuance, only then might the court consider imposing continued contact over the objections of his caretakers. In most instances, we believe that the court will and should defer to the adopting parents and the primacy of their relationship with the child.

Although review of post-adoption contact agreements will be a delicate task, the special needs of the adopted child and his extended family should no longer be treated as if they were nonexistent, left to the exclusive province of mental health professionals. Courts have a continuing responsibility to oversee, when needed, a relationship which the law has created.

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319. Grotevant et al., *supra* note 185, at 145.